CH. 19
EVIDENCE

§19-1
Right to Present Evidence

United States Supreme Court
Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) Whether based on due process or the compulsory process and confrontation clauses of the Sixth Amendment, the federal constitution guarantees a meaningful opportunity to present a complete defense. This right is violated by a rule which infringes on the ability to present a defense and which is arbitrary or disproportionate to its intended purpose. However, the Federal Constitution permits rules of evidence which exclude evidence on the ground that the probative value is outweighed by other factors such as unfair prejudice, confusion of the issues, or potential to mislead a jury.

Under a rule adopted by the South Carolina Supreme Court, defense evidence showing that someone other than the defendant committed the crime is admissible if it raises a reasonable inference of the defendant's innocence. Such evidence is inadmissible, however, if it merely casts bare suspicion on another or raises a "conjectural inference" of a third party's guilt. In this case, the South Carolina Supreme Court interpreted the rule as precluding defense evidence of third party guilt if the State has strong forensic evidence of the defendant's guilt.

The Supreme Court concluded that the South Carolina rule violated the constitutional right to present a defense, because it excluded evidence of third party guilt based solely on the strength of the prosecution's case, even if the defense evidence had great probative value and did not cause harassment, prejudice or confusion of the issues. In addition, the court criticized the South Carolina rule because it took the prosecution's evidence at face value, without any examination of credibility or reliability, and because it was not rationally related to its intended purpose - to focus the trial on central issues by excluding evidence which has only a weak logical connection to those issues. See also, **Montana v. Egelhoff**, 518 U.S. 37, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) (due process does not guarantee the right to present, and have considered by the trier of fact, all relevant evidence to rebut the prosecution's evidence concerning the elements of the offense, as relevant evidence may be excluded because it is incompetent or privileged, because the defendant has failed to comply with procedural requirements, or because the probative value is substantially outweighed by the danger of unfair prejudice, undue delay or the needless presentation of cumulative evidence; although due process does place limits on a State's ability to restrict the introduction of relevant evidence, those limits arise only where the restriction "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental").

U.S. v. Scheffer, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) The right to present relevant evidence is subject to reasonable restrictions, and may be required to "accommodate other legitimate interests in the criminal trial process." Thus, State and Federal rulemakers have broad latitude to establish rules excluding evidence from criminal trials. Such exclusionary rules do not abridge the right to present a defense so long as they are not "arbitrary" or "disproportionate" to their purpose; the exclusion of evidence is unconstitutionally "arbitrary" or "disproportionate" only if "it [infringes] upon a weighty interest of the accused."

A per se ban of polygraph evidence in military justice proceedings serves the legitimate governmental interest of insuring that the trier of fact in a criminal trial considers only reliable evidence. Because there is no consensus in the scientific community that polygraph evidence is reliable, a per se ban cannot be considered "arbitrary" or "disproportionate."

A plurality of the court found that a per se prohibition of polygraph evidence serves two additional governmental interests: (1) preserving the jury's function of making credibility determinations (i.e., preventing the trier of fact from being unduly persuaded by polygraph evidence), and (2) avoiding litigation over collateral issues such as the appropriateness of the test procedures, the qualifications of the examiner, the validity of interpretations of the test results, and whether the examinee was able to use countermeasures to distort the polygraph readings.

Rock v. Arkansas (admission of the defendant's hypnotically refreshed testimony), **Washington v. Texas** (testimony by an accomplice in the defendant's favor) and **Chambers v. Mississippi** (exclusion of a third party's confession to the crime with which the defendant was charged), all of which struck down per se bans on certain types of evidence, do not require admission of polygraph evidence when offered by a criminal defendant. In those cases, the per se exclusions "significantly undermined fundamental elements of the accused's defense" by excluding factual evidence or testimony about the case itself. By contrast, no fundamental element of the defense is undermined by exclusion of polygraph evidence - the respondent is merely barred from introducing an expert's opinion to boost his own credibility.

In a footnote, the court observed that **Daubert v. Merrell Dow Pharmaceuticals, Inc**., 509 U.S. 579 (1993), which superseded **Frye v. U.S**., 293 F. 1013 (C.A.D.C. 1923) concerning the admissibility of expert testimony, was not intended to foreclose per se exclusionary rules for certain types of expert or scientific evidence.

Taylor v. Illinois, 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988) Criminal defendants have the right to present relevant, competent evidence and witnesses in their defense.

Illinois Supreme Court

People v. Walker, 211 Ill.2d 317, 812 N.E.2d 339 (2004) Adopting the reasoning of **Old Chief v. U.S**., 519 U.S. 172 (1997), the court held that where a prior felony conviction is introduced solely to prove the defendant's status as a convicted felon, the trial court errs by allowing the State to reject a defense offer to stipulate to the fact of the prior conviction. Where the sole purpose of the evidence is to establish felony status, the precise name and nature of the prior conviction present a risk of prejudice that outweighs the probative value.

The court noted that the same rule would not apply had the name and nature of the prior conviction been admissible for purposes other than to prove defendant's felony status.

People v. Lopez, 207 Ill.2d 449, 800 N.E.2d 1211 (2003) Illinois courts have no authority to order a physical examination of the complainant in a sex offense case.

Under the rationale of **People v. Wheeler**, 151 Ill.2d 298, 602 N.E.2d 826 (1992), the State is precluded from introducing an examining expert's testimony if the complainant in a sex offense prosecution refuses to submit to a physical examination by a defense expert. To determine what medical evidence the State is allowed to introduce, the trial court must balance the due process rights of the defendant and the privacy rights of the alleged victim. Here, the defense conceded that the State should be able to introduce non-examining expert testimony concerning the complainant's physical condition. Furthermore, “it would be error

to exclude expert evidence by the State that is objectively verifiable without an independent physical examination."

People v. Kirchner, 194 Ill.2d 502, 743 N.E.2d 94 (2000) The trial judge did not err by denying a defense request to have a critical State's witness submit to a psychological and psychiatric evaluation. A reviewing court will not overrule the trial judge's ruling on the scope of cross-examination unless there has been a clear abuse of discretion resulting in manifest prejudice.

Because the witness's mental health treatment records were provided to the judge in camera, defendant was allowed to use eight documents as impeachment, and the witness testified concerning his history of substance abuse, mental illness, and memory problems, the refusal to order a psychological and psychiatric examination did not constitute an abuse of discretion or cause manifest prejudice.

People v. Buss, 187 Ill.2d 144, 718 N.E.2d 1 (1999) No error occurred where relevant evidence was admitted despite the defendant's offer to stipulate. Once a defendant pleads not guilty, the State is entitled to prove every element of the offense, even if the defense does not dispute the relevant facts or offers to stipulate to them. Thus, evidence that is relevant and more probative than prejudicial need not be excluded, even where the State rejects an offer to stipulate. See also, **People v. Speck**, 41 Ill.2d 177, 242 N.E.2d 208 (1968) (when a defendant pleads not guilty, the State has the right to prove every element of the crime charged and is not obligated to rely on a defendant's stipulation). But see**, Old Chief v. U.S**., 519 U.S. 172, 117 S.Ct. 574, 136 L.Ed.2d 574 (1997) (prosecutor was not entitled to refuse an offer to stipulate to existence of prior conviction as predicate for offense; prior conviction was relevant only to establish defendant's legal status, and it was likely jury would consider details of prior conviction on issue of defendant's guilt of this offense).

People v. Reid, 179 Ill.2d 297, 688 N.E.2d 1156 (1997) Generally, the standard of review for questions involving the admission of evidence is "abuse of discretion."

People v. Melock, 149 Ill.2d 423, 599 N.E.2d 941 (1992) Under these circumstances, the due process right to present a defense, which includes the right to explain the circumstances of a confession so that the jurors may weigh its reliability, required an exception to the general rule barring polygraph evidence. The defense sought to introduce the fact that defendant was falsely told that the polygraph had proven his guilt, in order to explain why defendant had made a confession that he claimed was false.

People v. Wheeler, 151 Ill.2d 298, 602 N.E.2d 826 (1992) The combined effect of Ch. 38, §115-7.1, which barred a trial judge from ordering the victim in a sex offense to undergo a psychological examination, and Ch. 38, §115-7.2, which provides that expert testimony on post-traumatic stress syndrome shall be admitted, was to deny defendant's due process right to present witnesses in his own behalf. The State would enjoy an unfair advantage if it could introduce expert testimony based upon a personal examination while the defense expert was restricted to examining written reports and observing the complainant's testimony.

Although a complainant cannot be compelled to submit to an examination by a defense expert, her refusal to do so precludes the State from introducing rape trauma syndrome evidence based on a personal examination. See also, **In re Kortte,** 317 Ill.App.3d 111, 738 N.E.2d 983 (2d Dist. 2000) (725 ILCS 207/30(c), which provides that if the respondent in a

sexually violent person proceeding fails to cooperate with an evaluating expert from the Department of Human Services he "shall be prohibited from introducing testimony or evidence from any expert or professional person who is retained or court appointed to conduct an evaluation of the person," violated due process where, although the respondent failed to cooperate, the State calls an evaluating expert who based his evaluation on written records rather than on a personal evaluation of the respondent; §30(c) was intended to assure a "level playing field" by precluding the defense from calling an examining witness where the respondent's failure to cooperate prevents the State from calling such an expert, and does not prevent the defense from eliciting expert testimony where the State is able to introduce such testimony despite the failure to cooperate).

People v. Cobb, 97 Ill.2d 465, 455 N.E.2d 31 (1983) The trial court abused its discretion by refusing to allow the defense a continuance to locate and call a State's witness, who could have provided a foundation for testimony that the offense had been committed by the witness and a third party. The court noted that the evidence would have directly contradicted the State's chief witness and was crucial for the defense case.

People v. Manion, 67 Ill.2d 564, 367 N.E.2d 1313 (1977) An accused has the right to present a defense, including calling witnesses to establish a defense and presenting his version of the facts to the trier of fact.

Illinois Appellate Court

People v. Avendano, 2023 IL App (2d) 220176 The trial court did not abuse its discretion when it prevented defendant from introducing evidence. In a predatory criminal sexual assault trial, the State was allowed to introduce evidence of a prior allegation of similar conduct. The defense moved to introduce the fact that DCFS had determined this allegation to be "unfounded." Defendant cited **People v. Ward**, 2011 IL 108690, which held that defendant has a right to introduce the fact that he was acquitted of other crimes introduced by the State. The appellate court here found **Ward** distinguishable, as a DCFS finding of "unfounded" is not equivalent to a not guilty verdict. Additionally, at the time of the DCFS finding, there hadn't been corroboration of in the form of the instant offense.

People v. Jenkins, 2021 IL App (1st) 200458 On direct, an officer who testified to seeing defendant holding a gun testified that she did not wear a body-cam, was never given a body-cam to wear, and that as a member of the U.S. Marshals Fugitive Task Force, she was "exempt" from the body-cam law. The defense was barred from cross-examining the witness on the body-cam requirements and its exemptions. And the trial court refused non-pattern jury instructions tendered by the defense, which sought to inform the jury that the witness was in fact required to wear a body-cam.

The Appellate Court found no error. The details of the body-cam law were improper subjects for cross-examination of a fact witness. The defense should have called its own witness to establish department policy on body-cams. Although the witness mentioned she was "exempt," she apparently made that assumption from the fact that neither she nor other task force members were issued body-cams. Either way, the line of questioning was not relevant. Even if she was incorrect about being "exempt," this mistake would not affect her credibility where it was presumably her department who had made such a determination.

Nor did the trial court abuse its discretion in refusing to instruct the jury as to 50 ILCS 706/10-30, which states that if a recording was intentionally not captured, the jury shall consider that fact in weighing the evidence, unless the State provides a reasonable

justification. The Appellate Court took judicial notice of a Chicago Police Department directive establishing that body-cams are required only for "Bureau of Patrol" officers and that other unspecified members are exempt from the body-cam law. Defendant failed to establish that the task force witness was not exempt, and therefore there was no basis for the instruction.

People v. Cross, 2021 IL App (4th) 190114 The circuit court did not abuse its discretion when it precluded defendant from introducing an alleged third-party admission. Defendant argued that a man named Gardner took credit for the killing in a rap video. The Appellate Court affirmed after analyzing the evidence under the factors outlined in **Chambers v. Mississippi**, 410 U.S. 284 (1973).

The statements were made three months after the shooting and posted online. Therefore, they were not made spontaneously to a close acquaintance shortly after the crime occurred. Second, they lacked substantial corroboration aside from defendant and his girlfriend's testimony that Gardner drove the vehicle used in the shooting, which the Appellate Court found "too vague" to corroborate the confession. The statements were also not sufficiently self-incriminating because the lyrics did not explicitly take credit for the offense and the phrase "had to hunt him down" never actually states that Gardner himself did so. The court noted that, regardless, hip hop lyrics often describe or take credit for crimes the artist had no actual involvement in, and thus any admission contained in a rap video would have little probative value. Finally, there was no opportunity to cross-examine Gardner because he was shot and killed before trial. Thus, the statement was properly excluded.

Finally, citing only a similar complaint in its own prior opinion, the court bemoaned appellants' tendency to "constitutionalize" evidentiary issues by claiming the exclusion of defense evidence violates the defendant's due process right to present a defense. The court found the claim "adds only clutter to whatever legitimate arguments he may have on appeal."

People v. Mayberry, 2020 IL App (1st) 181806 The trial court did not err in barring evidence that the gun used in the instant shooting was also used in another crime, three months later, at a time when defendant was already in custody for this offense. While defendant intended to introduce it as evidence of an alternate suspect, the use of a single weapon in both offenses was not enough where there were not other commonalities between the two crimes and no evidence that the alleged perpetrator of the later offense had any connection to the instant shooting.

People v. Haiman, 2018 IL App (2d) 151242 A defendant has the right to the meaningful opportunity to present a defense, but evidence of a purported defense can be excluded if its probative value is outweighed by its prejudicial impact, if the evidence would lead to confusion of the issues, or if the evidence has the potential to mislead the jury. Where defendant was charged with unlawful possession of a controlled substance, the court did not abuse its discretion in prohibiting defendant from testifying that she had a prescription for the pills in question. Defendant disclosed the proposed defense to the State but did not provide a copy of a prescription and said she would not name the prescribing doctor or date of prescription.

It is defendant's burden, pursuant to 720 ILCS 570/506, to establish her right to possession of the substance pursuant to a lawful prescription under 720 ILCS 570/302(c)(3). Defendant's proposed self-serving testimony would have verged on a conclusion of ultimate fact and would have rendered the burden of proof meaningless. Her testimony also would

have been legally insufficient because the pills were not in their original container and the statutory defense requires proof that the prescription was issued by a "practitioner" which could not be established on defendant's non-specific testimony.

People v. Johnson, 2018 IL App (1st) 140725 The trial court did not abuse its discretion nor infringe on defendant's right to present a defense when it barred expert testimony from a doctor, and lay testimony from defendant's family, that would show that defendant was in a confused state following an epileptic seizure at the time of the shooting. The defense made clear that it was not raising an insanity defense, but rather wanted to show the absence of a voluntary act. The Appellate Court agreed with the State's argument that the testimony gave rise to a diminished capacity defense, which is not allowed in Illinois. Unlike other cases finding involuntary acts are not criminal, the testimony here could not establish whether the acts after a seizure are voluntary or involuntary. Thus, the testimony was irrelevant, would not aid the jury and would confuse the issues.

People v. Fillyaw, 2018 IL App (1st) 150709 At defendants' retrial, the court allowed the State to admit the prior trial testimony of an unavailable witness. The trial court erred, however, in refusing to allow defendants to impeach that prior testimony with a recantation affidavit from that witness. Under Illinois Rule of Evidence 806, where a hearsay statement is admitted at trial, its credibility can be attacked by any evidence the same as if the hearsay declarant had testified at the trial. And, under Illinois Rule of Evidence 901, the recantation affidavit could be authenticated by establishing a rational basis on which the fact-finder could conclude it had been written by the declarant. Here, defendants were prepared to call the witness who notarized the affidavit to establish its authenticity. The trial court's skepticism of the recantation is not a basis on which the affidavit could be excluded. And, the court's error was not harmless where the witness in question was important to the State's case.

People v. Barnes, 2017 IL App (1st) 143902 The State alleged that defendant and a co-defendant entered the complainant's hotel room, beat him, and stole his money clip. The complainant identified defendant as the offender, and the co-defendant testified as to the defendant's planning of and participation in the home invasion and robbery. Defendant testified that the complainant invited defendant to his room for purposes of a sexual encounter, and when defendant resisted, the complainant grabbed him, prompting defendant to defend himself.

On appeal, the defendant asserted that the trial court erred in denying his **Lynch** motion, seeking to introduce the complainant's 21-year-old convictions for resisting arrest and battery. The defendant alleged that the age of the convictions are not a part of the **Lynch** analysis, and go to weight rather than admissibility. The Appellate Court disagreed, finding the Illinois Supreme Court, in cases such as **People v. Morgan**, 197 Ill. 2d 404 (2001), has implicitly recognized remoteness as a relevant factor when considering the admissibility of prior convictions under **Lynch**. Furthermore, defendant failed to establish that either prior conviction indicated that the complainant was physically violent toward others.

People v. White, 2017 IL App (1st) 142358 Defendant was convicted in a bench trial of delivery of a controlled substance. The officer who conducted the controlled buy testified that he did not remember seeing scars on the seller's face or tattoos on his body. Similarly, the surveillance officer testified that he had a clear and unobstructed view of the seller, who was wearing a white tank top, and that he did not observe any tattoos on the seller's body.

In the defense case, defense counsel sought to demonstrate tattoos on defendant's arms to the trial judge. The officer testified that the seller conducted the transaction with his right arm, and the judge allowed the defendant to show the top of his right arm but only with the palm down. In denying counsel's request that defendant be allowed to show the tattoos on his right arm with his palm up, the judge stated that defense counsel had not asked the officer whether defendant's palm was up or down. The record showed that defendant had a tattoo from elbow to wrist on his forearm, but the judge stated that the tattoo could not be seen when defendant had his palm down.

The trial judge also found that it was irrelevant that defendant had a tattoo on his left arm because the record showed that the seller performed the transaction with his right arm. In addition, the trial court overruled defense counsel's objection that the judge was observing defendant's tattoos while on the bench and from above, instead of standing next to defendant as the officer had done when conducting the buy.

The officer who conducted the buy was recalled and testified that he did not remember how defendant's hand was positioned during the transaction. However, the officer demonstrated how defendant reached toward him during the buy, and the trial court stated that the officer's arm was extended with the palm down.

The Appellate Court found that defendant was denied a fair opportunity to present his defense that he had been misidentified because the trial court required defendant to show his forearm with the palm down, refused to allow defendant to show the tattoo on his left arm, refused to permit the officer who conducted the buy to identify defendant's tattoos in court, and refused to allow defendant to demonstrate that his tattoos would have been visible from the officer's position at the time of the offense.

A criminal defendant is constitutionally guaranteed a meaningful opportunity to present a complete defense. Here, defendant was denied such an opportunity because the trial court substituted its own observations of defendant's tattoos for a demonstration whether the officer could have seen the tattoos during the offense. Evidence that the tattoos would have been visible to the officer at the time of the transaction would have been unquestionably probative and relevant to the credibility of the officer's identifications of defendant as the drug dealer. Furthermore, the demonstration would have been conducted under substantially similar conditions so long as the positions of defendant and the officer were the same as during the transaction.

The court also found that the trial court's view from its vantage point on the bench some two feet above defendant was not indicative whether defendant's tattoos could have been seen by a person who was standing in front of him. Thus, the trial court erroneously substituted its view of defendant's arm under conditions that were not substantially similar to the conditions at the time of the offense.

The trial court also erred by refusing to allow defense counsel to introduce evidence regarding the tattoos on defendant's left arm. The court deemed such evidence irrelevant, because the seller conducted the transaction with his right arm.

However, the offense allegedly occurred about 5:30 p.m. on a summer day, and the officer who made the buy said that the seller emerged from a garage in an alley and walked toward him. The officer was therefore able to observe the seller's left arm, and he did not testify otherwise. The trial court's ruling denied defendant a fair opportunity to challenge the officers' identification by showing that he had a tattoo on his left arm which extended from elbow to wrist.

The court rejected the argument that the errors were harmless. The court noted the officers' clear testimony that they did not see any tattoos on the seller's forearms. In addition, the identification evidence was less than overwhelming, defendant did not have any narcotics

or prerecorded funds on his person or in his home when he was arrested, and a photo array in which one of the officers identified defendant was arranged in such a way that defendant's photograph was emphasized.

Defendant's conviction was reversed and the cause remanded for a new trial.

People v. Villa, 403 Ill.App.3d 309, 932 N.E.2d 90 (2d Dist. 2010) In Illinois, rules of evidence are derived both from case law and statutory authority. The legislature does not offend the separation of powers doctrine by enacting new rules of evidence, or by altering existing rules that were originally adopted by Illinois Supreme Court decisions.

By contrast, the legislature may not modify a Supreme Court Rule, which is promulgated under the Supreme Court's constitutional authority over the court system.

A defendant may "open the door" to what would otherwise be inadmissible evidence by testifying in a manner which can be reasonably construed as an attempt to mislead the jury. Here, defendant "opened the door" to evidence of his prior juvenile adjudication.

Defendant claimed that he gave police a false statement because he was afraid, and because he had "never been in a situation like that before." Defendant also stated, "I've never been in prison or nothing like that." Because 18 months earlier defendant had given the same two officers a statement about a different offense, "it is not unreasonable to construe [his] attempt to portray himself as unseasoned" as an attempt to mislead the jury.

People v. Carmona-Olvara, 363 Ill.App.3d 162, 842 N.E.2d 313 (1st Dist. 2005) A defendant is entitled to call an interpreter to give an alternative interpretation of a statement made in a foreign language. Where the arresting officer was the only witness to testify concerning the meaning of defendant's statement in Spanish, there was a real possibility that the interpretation was affected by bias or partiality.

People v. Willis, 299 Ill.App.3d 1008, 702 N.E.2d 616 (1st Dist. 1998) A trial judge has discretion to allow testimony to be heard outside the courtroom. The trial judge did not err by having the jury transported to a hospital in order to hear the testimony of the victim of an attempt first degree murder.

The State was not required to agree to defendant's offer to stipulate, and had the right to present evidence of every element of the crimes although alternative means (such as an evidentiary deposition) were available. The court also held that viewing the witness in the hospital was no more prejudicial than having him transported to the courtroom, because his medical condition would have required the presence of medical personnel and equipment in either case.

The trial court did not err by allowing a physician to testify at the hospital rather than by coming to the courtroom. The doctor's testimony was important to demonstrate the injuries experienced by the victim, whose testimony was to be heard at the hospital.

People v. Quick, 236 Ill.App.3d 446, 603 N.E.2d 53 (1st Dist. 1992) Defendant's constitutional right to present a defense was denied when she was not allowed to testify that her family had been threatened when she attempted to withdraw from a conspiracy, especially when the man who allegedly made the statements was allowed to testify in rebuttal that he had not made any threats.

§19-2
Relevant Evidence

§19-2(a)
Generally

Illinois Supreme Court

People v. Pikes, 2013 IL 115171 The concerns underlying the admission of other-crime evidence are not present when the uncharged crime was not committed by the defendant. There is no danger that the jury will convict the defendant because it believes he has a propensity to commit crimes. The admissibility of such evidence is analyzed under ordinary principles of relevance, not according to rules governing the admission of other-crime evidence.

Defendant was charged with a murder that allegedly arose out of a conflict between two gangs. The feud began with the shooting of a member of defendant's gang. Then on the day prior to the murder, a rival gang member rode a scooter into the territory of defendant's gang. When Donegan, a member of defendant's gang, shot at the person on the scooter, he was struck by a car containing other rival gang members that was following the scooter. Donegan then recruited defendant to assist him in exacting revenge by committing a drive-by shooting, which led to the murder for which defendant was convicted.

The Appellate Court reversed the conviction, finding that evidence of the scooter shooting was improperly admitted as other-crime evidence where there was no evidence connecting defendant to that incident.

The Illinois Supreme Court reversed the Appellate Court. Because it is undisputed that defendant was not involved in the scooter shooting, the scooter shooting is not evidence of another crime for purposes of evaluating its admissibility. The scooter incident was relevant to show defendant's motive for the subsequent murder. The fact that defendant may have had a secondary motive, the rival gang's shooting of defendant's fellow gang member, did not mean that he was not also motivated to retaliate for the scooter incident.

The defendant was not prejudiced by a jury instruction that directed the jury to determine whether defendant was involved in conduct other than that charged in the indictment. There was evidence at trial that at the time of the murder defendant and Donegan drove a car stolen by use of a "jiggler" key. Since the evidence at trial clearly showed that defendant was not involved in the scooter shooting, the instruction must have referred to the stolen car.

The Supreme Court also rejected defendant's argument that evidence of the scooter shooting should have been excluded because the motive for the murder was not the scooter shooting, but rather the subsequent striking of Donegan with the car. This was not a random incident in which Donegan was struck by a car. The car followed the gang member on the scooter. There was a continuing gang war between the two gangs. These two events were linked and it would be illogical to separate them and give the jury only half the story.

Defendant was not prejudiced by the admission of evidence of the scooter shooting. Any concern about an implied inference of guilt by association would more likely come from the evidence of defendant's gang membership than from the scooter shooting in which defendant was clearly not involved.

The Supreme Court remanded for the Appellate Court's consideration of the remaining issues raised by defendant.

People v. Morgan, 197 Ill.2d 404, 758 N.E.2d 813 (2001) It is within the trial court's discretion to decide whether evidence is relevant; the trial judge's decision will be reversed only if there was a clear abuse of discretion. An abuse of discretion occurs only where the trial court's decision is "arbitrary, fanciful or unreasonable," or where no reasonable man would take the trial court's view.

Evidence is relevant if it has the tendency to make the existence of any fact that is of consequence to the determination of an action either more or less probable than it would be without the evidence. Even relevant evidence may be excluded, however, where it is remote, uncertain or speculative.

People v. Patterson, 192 Ill.2d 93, 735 N.E.2d 616 (2000) The court rejected the State's argument that other suspects' allegations of beatings or torture are admissible only if the defendant suffered a physical injury. The existence of a physical injury is but one factor to be considered in determining whether evidence of prior allegations of police brutality are relevant in a particular case. See also, **People v. Newbury**, 53 Ill.2d 228, 290 N.E.2d 592 (1972) (evidence is inadmissible where its relevance depends upon unproved assumptions).

People v. Eyler, 133 Ill.2d 173, 549 N.E.2d 268 (1989) In the trial court's discretion, relevant evidence may be excluded if its prejudicial effect substantially outweighs its probative value.

People v. Monroe, 66 Ill.2d 317, 362 N.E.2d 295 (1977) Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence.

People v. DeHoyos, 64 Ill.2d 128, 355 N.E.2d 19 (1976) Although relevant evidence is normally admissible, its admissibility may also depend on whether its probative value outweighs its prejudicial effect. Evidence should be excluded when its prejudicial effect far outweighs its probative value.

Illinois Appellate Court

People v. Bliefnick, 2024 IL App (4th) 230707 Defendant was convicted of his wife's murder and appealed, raising multiple issues. The appellate court first held that defendant was not denied effective assistance of trial counsel based on counsel's failure to object to the trial court's ordering his wife's attorneys to share their privileged case files with the police before trial and allowing the attorneys to testify at defendant's trial to their private, privileged conversations with his wife. Any objection based on privilege would have failed because defendant lacked standing to assert his wife's evidentiary privilege. This was particularly apparent where the effect of allowing defendant to assert his wife's privilege would have been entirely self-serving, precluding the jury from hearing potentially incriminating evidence against him.

Further, any privilege relating to information relevant to defendant's prosecution for his wife's murder was impliedly waived or excepted from traditional privilege protections. The attorney-client privilege generally survives the death of a client. The court noted, though, that there is an exception for wills, where the theory is that a decedent would waive privilege if she was able, so that her intent as to distribution of her estate could be effectuated. The court applied the same reasoning here. Enforcing the privilege would be of no benefit to the client or the courts, but rather would undermine her interest in the successful prosecution of her killer. The court concluded that defendant's wife would not have asserted her attorney-client privilege in defendant's prosecution for her murder, even if she could have.

The court also concluded that there was no reversible error in allowing various individuals to testify to defendant's wife's hearsay statements under the forfeiture by wrongdoing doctrine. Defendant challenged the evidence on relevancy grounds. Evidence is relevant where it has the tendency to make the existence of any fact at issue more or less probable. The appellate court found that many of the challenged statements were relevant evidence of defendant's motive where the statements detailed the contentious nature of the divorce proceedings between defendant and his wife and described defendant's anger toward his wife.

With regard to defendant's wife's statements regarding her fear of defendant, however, the appellate court found that the trial court erred in admitting them to show the victim's state of mind. Her state of mind was not relevant to any issue in the case. Ultimately, though, the court concluded that any error was harmless because the evidence of defendant's guilt was overwhelming. Thus, there was no reasonable probability the jury would have acquitted defendant even had the contested statements been excluded as irrelevant.

People v. Jones, 2024 IL App (1st) 221555 The trial court did not err in excluding body camera footage video where the officer stated his belief that one of the individuals with defendant had murdered two people previously. Defendant argued that the footage was relevant to support his claim of self-defense for firing at the officer in the basement of a home where the police had pursued him. More specifically, the officer may have believed that he was pursuing the other individual and would be confronting a possible double-murderer, making it more probable that the officer fired first in the belief he needed to protect himself and defendant fired back in self-defense. The appellate court agreed that this evidence was "somewhat relevant," but ultimately concluded it had minimal and speculative probative value.

The court first clarified that the appropriate standard of review is whether the trial court abused its discretion in excluding the evidence. Defendant had argued for *de novo* review, asserting a denial of his constitutional right to a meaningful opportunity to present a complete defense. But, the court found that this was an ordinary relevance ruling and did not rise to the level of a constitutional violation. On the merits, the court found no abuse of discretion. There was no other evidence that the officer fired first, and admission of his statements on the body camera footage would have encouraged speculation on that question. And, even if the evidence should have been admitted, its minimal probative value precluded any finding that defendant was prejudiced by its exclusion.

People v. Mayberry, 2020 IL App (1st) 181806 The trial court did not err in barring evidence that the gun used in the instant shooting was also used in another crime, three months later, at a time when defendant was already in custody for this offense. While defendant intended to introduce it as evidence of an alternate suspect, the use of a single weapon in both offenses was not enough where there were not other commonalities between the two crimes and no evidence that the alleged perpetrator of the later offense had any connection to the instant shooting.

People v. Tatum, 2019 IL App (1st) 162403 Trial court did not err in allowing autopsy photos into evidence. Although the cause and manner of death were not disputed, relevance does not require that the evidence tend to prove only disputed facts at trial. The State may offer evidence tending to prove any essential fact, even if that fact is not disputed. While the court initially found that the photos should not be published to the jury during the trial,

defense counsel's closing argument made the photos relevant to the theory of defense and therefore the court did not err in sending them back to the jury room during deliberations.

People v. Clark, 2018 IL App (2d) 150608 Evidence of a witness's commission of another crime is not analyzed as "other crimes" evidence under Illinois Rule of Evidence 404(b). Instead, admissibility is evaluated under ordinary relevance principles. Here, defendant admitted participating in a robbery with the co-defendant, Nesbit, where Nesbit brandished a firearm. The sole issue before the jury was whether the gun displayed by Nesbit was real. At defendant's trial, Nesbit testified for the State. Nesbit's recent prior commission of an armed robbery with a real firearm was deemed relevant. Defendant's jury could reasonably infer use of a real firearm in this case based upon Nesbit's use of a real firearm in the prior armed robbery. The prejudicial impact of Nesbit's prior armed robbery did not outweigh its probative value where its use at defendant's trial was limited to the issue of whether the gun was real.

People v. White, 2017 IL App (1st) 142358 Defendant was convicted in a bench trial of delivery of a controlled substance. The officer who conducted the controlled buy testified that he did not remember seeing scars on the seller's face or tattoos on his body. Similarly, the surveillance officer testified that he had a clear and unobstructed view of the seller, who was wearing a white tank top, and that he did not observe any tattoos on the seller's body.

In the defense case, defense counsel sought to demonstrate tattoos on defendant's arms to the trial judge. The officer testified that the seller conducted the transaction with his right arm, and the judge allowed the defendant to show the top of his right arm but only with the palm down. In denying counsel's request that defendant be allowed to show the tattoos on his right arm with his palm up, the judge stated that defense counsel had not asked the officer whether defendant's palm was up or down. The record showed that defendant had a tattoo from elbow to wrist on his forearm, but the judge stated that the tattoo could not be seen when defendant had his palm down.

The trial judge also found that it was irrelevant that defendant had a tattoo on his left arm because the record showed that the seller performed the transaction with his right arm. In addition, the trial court overruled defense counsel's objection that the judge was observing defendant's tattoos while on the bench and from above, instead of standing next to defendant as the officer had done when conducting the buy.

The trial court erred by refusing to allow defense counsel to introduce evidence regarding the tattoos on defendant's left arm. The offense allegedly occurred about 5:30 p.m. on a summer day, and the officer who made the buy said that the seller emerged from a garage in an alley and walked toward him. The officer was therefore able to observe the seller's left arm, and he did not testify otherwise. The trial court's ruling denied defendant a fair opportunity to challenge the officers' identification by showing that he had a tattoo on his left arm which extended from elbow to wrist.

Defendant's conviction was reversed and the cause remanded for a new trial.

People v. Lopez, 2014 IL App (1st) 102938-B The admissibility of evidence of a prior crime in which the defendant was not a participant is determined under ordinary principles of relevance, and not by standards governing other crimes evidence. **People v. Pikes**, 2013 IL 115171. The trial court abused its discretion by admitting evidence that three weeks before the murder with which defendant was charged, some of the co-defendants in the charged offense beat a man and vandalized property in the same parking lot where the charged crime occurred. The court noted that the only evidence tying the prior incident to the charged crime

was that three of the co-defendants in the charged crime participated in the earlier crime. There was no evidence that defendant knew about the earlier incident or that the charged crime was in any way motivated by the earlier event.

The court stressed that the key issue in the charged offense was whether the State proved beyond a reasonable doubt that defendant was one of the perpetrators in the beating death of the decedent. Evidence about an unrelated incident several weeks earlier had no probative value on that issue, at least in the absence of evidence indicating that there was some link between the offenses.

Defendant's conviction for murder was reversed and the cause remanded for a new trial.

People v. Diomedes, 2014 IL App (2d) 121080 In order to admit a document as substantive evidence, the proponent must authenticate its authorship. A document may be authenticated through circumstantial evidence. In other words, the authentication requirement is satisfied where the document's contents, in conjunction with other circumstances, reflect distinctive characteristics which connect it to the author. Illinois Rule of Evidence 901(b)(4).

At defendant's trial for disorderly conduct based on transmitting by email a threat of violence, the email in question was properly authenticated by circumstantial evidence. Thus, the email was properly admitted substantively.

The court noted that the email raised several matters that were also contained in notes on a folder which was confiscated from defendant. Under the circumstances, it would have been reasonable for the trial court to find that the same person wrote both the email and the notes on the folder. The court also noted that in a voluntary written statement, defendant stated that he had written the email.

Under these circumstances, the email was sufficiently authenticated to be admitted. The court rejected defendant's argument that to authenticate an email, the State was required to present evidence to "connect" defendant to the IP address from which the email was sent.

People v. Starks, 2014 IL App (1st) 121169 At defendant's trial for first degree murder, a police officer testified that while she and other officers were investigating an unrelated case at an apartment building, they observed defendant exit the back of the building and run through an alley while wearing a t-shirt and no shoes. When the officer stopped defendant and learned his name, she realized that he was the subject of an investigative alert.

A second officer testified that as part of the unrelated investigation, he entered an apartment where the door was ajar. He observed three handguns on the kitchen counter. One of the handguns was subsequently determined to have been the weapon used in the shooting with which defendant was charged.

DNA analysis revealed that the weapon used in the shooting contained the mixed DNA profiles of at least three people and that defendant could not be excluded as the primary contributor of the DNA. The shooting had occurred two months before the weapon was seized from the apartment.

The Appellate Court held that the trial judge erred by admitting evidence of weapons that were found in the apartment but which were not shown to have any connection to the offense. A weapon found in the defendant's possession is generally inadmissible unless it has some connection to the crime charged. For a weapon to be admitted, there must be evidence to connect it to both the defendant and the crime. Evidence that the weapon is suitable for commission of the crime satisfies the second element.

Here, it was error to admit the weapons because there was no evidence to connect them to the defendant. Not only was there no evidence to show that defendant possessed the weapons, there was no evidence to connect him to the apartment where the weapons were found. Defendant was stopped because, while police were investigating an unrelated offense, they saw him running barefoot through the alley. He was not seen leaving the apartment where the weapons were found, and there was no evidence to connect him to either the apartment or the two weapons that were not suitable for committing the offense. Under these circumstances, those weapons were irrelevant and should not have been admitted. Because the evidence was closely balanced, admission of the weapons constituted error under the first prong of the plain-error doctrine.

People v. Barnes, 2013 IL App (1st) 112873 Defendant was charged with heinous battery and aggravated battery of a child after a four-year-old child in his care suffered severe burns when he was exposed to hot water. The court concluded that the trial court abused its discretion by allowing the assistant State's Attorney to use the child as an exhibit by pulling down his pants, picking him up, and showing the jury the scars on his side and legs.

Although permanent disfigurement is an element of heinous battery, using the child as an exhibit was cumulative where the State had already established permanent disfigurement through photographs and expert testimony. The court also found that due to the risk of inflaming the jury's passions, the prejudicial effect of using the child as an exhibit outweighed any probative value.

Also, the trial court erred by admitting evidence that the four-year-old victim suffered a liver contusion at some point. Defendant was charged with injuring the child by exposing him to hot water. The State's expert testified that the child's blood work indicated that he had suffered a liver contusion at some point within the 24 to 36-hour-period before he was examined at the emergency room. The State's expert also admitted that the liver contusion may have had an explanation other than child abuse and that there were no signs of bruising on the child's abdomen. Defendant did not have sole custody of the child in the 24 to 36-hour-period preceding the examination.

In finding an abuse of discretion, the court concluded that the probative value of the evidence was tenuous and that there was only mere suspicion that defendant was responsible for the injury. In addition, the evidence was highly prejudicial because the jury would be more likely to convict the defendant of the charged crimes if it believed that he was also responsible for a separate injury.

The court concluded that the combination of errors caused manifest prejudice to the defense. The alleged justification for using the child as an exhibit was to establish the permanent disfigurement element of heinous battery. However, defendant did not dispute the cause or extent of the child's injuries, and the only issue was whether the defendant acted intentionally. Under these circumstances, it was unnecessary to display the child to the jury.

In addition, the evidence of defendant's intent was closely balanced. The jury chose to acquit of heinous battery, and there was testimony that defendant had cared for the child on several prior occasions without incident. Under these circumstances, the combined prejudice of displaying the four-year-old's physical scars and admitting evidence of an injury which could have been inflicted by someone other than the defendant could well have affected the verdict.

Defendant's conviction was reversed and the cause remanded for a new trial.

People v. Garcia, 2012 IL App (2d) 100656 It is within the trial court's discretion to determine whether evidence is relevant and admissible and the trial court's decision on the issue will not be reversed absent an abuse of discretion.

The police found cocaine and cannabis in defendant's car after a traffic stop. The trial court did not abuse its discretion in excluding evidence that defendant's passenger pleaded guilty to a lesser charge of cocaine possession. The State's theory was that defendant and his passenger jointly possessed the drugs and the passenger's admission did not establish his exclusive possession of the drugs or rule out joint possession with defendant.

McLauren, J., dissented. Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence.

While not conclusive or dispositive on the issue of possession, the guilty plea was relevant. It would have bolstered defendant's credibility when he said that the drugs were his passenger's "in that it would have taken much of the sting out of the idea that defendant was just looking for the most convenient person to blame. Furthermore, it weighs heavily against the simplest theory of events: defendant's truck, defendant's drugs, [the passenger's] bad luck." The case was credibility driven. Evidence of the passenger's guilty plea would have required the jury to actually consider the issue of joint possession and could have materially affected the verdict. It would not have been unduly prejudicial to the State because it claimed that the possession was joint.

People v. Wilson, 2012 IL App (1st) 092910 At defendant's trial for aggravated unlawful use of a weapon and unlawful use of a weapon, the trial court erred by precluding the defendant from introducing records of an Independent Police Review Authority investigation of the arresting officers' conduct during the events leading to the charges against the defendant. The defense theory was that after a police officer shot the unarmed defendant and planted a gun near him, officers mishandled the gun to account for the fact that it did not contain defendant's fingerprints. In his motion *in limine*, defendant presented evidence that the IPRA investigation concerned whether the first officer improperly fired at defendant and whether two other officers improperly handled the gun found next to the defendant.

The Appellate Court concluded that the IPRA investigation gave rise to an inference that the witnesses had something to lose or gain by testifying, because the investigation involved the same incident for which the defendant was charged and the outcome of both the investigation and the trial depended in large part on the testifying officers' portrayal of the events. "For obvious reasons, if an officer subjected to an IPRA investigation provides a statement to an investigator, the same officer could be motivated to testify consistently at a trial regarding the same incident to maintain his or her credibility."

The court concluded that evidence of the IPRA investigation was not remote or uncertain and directly affected the defendant's case. Therefore, the evidence should have been admitted on the issue of the motive and bias of the arresting officers.

The court concluded that the "abuse of discretion" standard of review applied to the above question. The court viewed the trial court's ruling as denying the motion *in limine* concerning the IPRA investigation, but allowing the defense to cross-examine on all relevant manners including interest or bias based on evidence other than the IPRA records. Rulings on motions *in limine* are generally left to the trial court's discretion, as are matters involving the admission of evidence. Furthermore, the trial court has discretion to limit the scope of cross-examination.

Defendant's convictions were reversed and the cause remanded for resentencing.

People v. Fillyaw and Parker, 409 Ill.App.3d 302, 948 N.E.2d 1116 (2d Dist. 2011) The mental health history of a witness may be relevant if it relates to the credibility of the witness. Witness Deshae R.'s psychiatric diagnosis, treatment with psychotropic medications, and experience with hallucinations may be relevant to her credibility as a witness. Therefore the circuit court was directed to conduct a further *in camera* review of her mental health records on remand, and tender to the defense attorneys the relevant portions of those documents.

People v. Garcia-Cordova, 2011 IL App (2d) 070550-B The trial court did not err by denying a motion *in limine* to exclude portions of defendant's statements to police which indicated that he had been sexually abused as a child. Evidence is admissible if it is relevant to an issue in dispute and the probative value is not substantially outweighed by the prejudicial effect. Evidence is relevant if it tends to make the existence of a fact that is of consequence to the proceeding either more or less probable than would otherwise be the case. The trial court has discretion to determine whether evidence is relevant and admissible.

The court concluded that defendant's history of having been sexually abused as a child was relevant in two respects: (1) in evaluating the credibility of defendant's statements to police, and (2) concerning the context in which those statements were made. The court noted testimony that defendant's demeanor changed after he admitted having been sexually abused as a child, and that he then made the written and oral statements that were admitted at trial.

Defendant's convictions were affirmed.

People v. Atherton, 406 Ill.App.3d 598, 940 N.E.2d 775 (2d Dist. 2010) In a prosecution for predatory criminal sexual assault, a child welfare supervisor who worked for a private social services agency testified to the characteristics of child-sexual-abuse-accommodation syndrome that are often observed in children who have been sexually abused. The Appellate Court addressed three issues related to the admissibility of that evidence.

Evidence is admissible when it is relevant to an issue in dispute and its probative value is not substantially outweighed by its prejudicial effect. Evidence is considered relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of an action more or less probable than it would be without the evidence.

Testimony regarding child-sexual-abuse-accommodation syndrome was relevant. Few jurors have sufficient familiarity with child sexual abuse to understand the dynamics of a sexually-abusive relationship. The defense attacked the credibility of the child witness by introducing evidence of her delayed reporting and inconsistencies in her testimony. The syndrome evidence aided the trier of fact in weighing that evidence.

People v. Limon, 405 Ill.App.3d 770, 940 N.E.2d 737 (2d Dist. 2010) Evidence is admissible if it: (1) fairly tends to prove or disprove the offense charged; and (2) is relevant in that it tends to make the question of guilt more or less probable. Evidence should be excluded if it is too remote in time or too speculative to shed light on a fact to be found.

At defendant's trial for robbery and aggravated battery, the State introduced evidence that 11 days following the offense in which complainant was robbed by two men, the police observed defendant and another man in dark clothing. Defendant first hid in a shadow, then ran when one of the officers identified himself as a policeman. The officer saw defendant grab at his waistband, trip, and fall. A handgun fell out of his pants. Defendant clenched his hands at his chest when the police attempted to handcuff him, causing the police to hit defendant

in the face and rib cage with fists to effect his arrest. The court instructed the jury to consider that evidence for the limited purpose of explaining the circumstances of the arrest.

The Appellate Court concluded that the court abused its discretion in admitting evidence of defendant's possession of the handgun. The probative value of evidence that defendant possessed a gun 11 days after the offense did not outweigh the prejudicial effect of this evidence where the charged offense did not involve any element of possession or use of a weapon.

Presentation of irrelevant, prejudicial evidence of the gun was not justified based on the hypothetical possibility that defendant would claim that he was coerced into making incriminating statements by police brutality. Evidence of the gun was not necessary to rebut a theory of coercion because defendant's refusal to put his hands behind his back was sufficient to explain the officers' use of force in effecting the arrest. Although defendant had not informed the court that he would not pursue a theory of coercion and police brutality, a defendant is not required to forgo, in advance, a potential defense to preclude the State from introducing irrelevant, prejudicial evidence. Even if defendant had advanced a theory of coercion, evidence of the gun was not relevant.

People v. Simmons, 372 Ill.App.3d 735, 867 N.E.2d 507 (1st Dist. 2007) The trial court erred by excluding defense evidence that someone else committed the crime. Generally, such evidence should be admitted if it tends to prove the particular offense in question. Although the evidence here was not clear, the court found that it was not so uncertain or speculative as to justify exclusion.

People v. Collins, 351 Ill.App.3d 175, 813 N.E.2d 285 (2d Dist. 2004) Where the State did not object in the trial court to consideration of the jury foreman's testimony about the effect of an unauthorized visit to the crime scene, and the prosecutor urged the trial judge to consider that testimony, the State was precluded from arguing on appeal that the evidence should have been excluded as improper evidence of the process by which the jury reached a verdict. "[A]bsent an objection, otherwise inadmissible evidence is to be given its full probative effect."

People v. Rivera, 145 Ill.App.3d 609, 495 N.E.2d 1088 (1st Dist. 1986) A witness's credibility is always a material issue. See also, People v. Adams, 106 Ill.App.3d 467, 435 N.E.2d 1203 (1st Dist. 1982) (the bias and relationship of a witness to the defendant are never collateral).

§19-2(b)
Examples

§19-2(b)(1)
Relevant Evidence

Illinois Supreme Court
People v. Bush, 2023 IL 128747 Defendant and his cousin, Mayfield, were involved in a neighborhood dispute which intensified over the course of a single day. The dispute culminated in a physical confrontation between two groups of individuals, ending with defendant's firing the shots that killed one man and injured another. Defendant claimed that he shot in self-defense, fearing for his safety and the safety of others. Ultimately, defendant

was convicted of felony murder predicated on mob action, aggravated battery with a firearm, and unlawful possession of a weapon by a felon.

The appellate court reversed defendant's conviction of aggravated battery with a firearm but otherwise affirmed. In the Supreme Court, defendant argued that the trial court erred in refusing to admit a State witness's rap video as a prior inconsistent statement at trial. Under 725 ILCS 5/115-10.1, a prior inconsistent statement may be admitted substantively if it meets certain requirements specified in the statute, specifically that it narrates, describes, or explains an event of which the witness had personal knowledge and that it was accurately recorded by video, audio, or other similar electronic means. Those requirements were met here, but the trial court reasoned that the rap video was made for entertainment purposes and thus was not akin to a prior witness statement and was therefore inadmissible. The Supreme Court concluded that the trial court abused its discretion in excluding the video.

Once a statement satisfies the requirements of Section 115-10.1, it is admissible so long as it is relevant. Here, the statements on the video bore a "strong nexus" to the circumstances of the underlying offense in that the rap purported to narrate the events of that day, thus it was relevant as a statement of historical fact. But, the error in excluding the video was harmless beyond a reasonable doubt because it was cumulative to other evidence introduced at trial.

People v. Epstein, 2022 IL 127824 The supreme court held that the trial court erred when it barred admission of a blood test showing a blood alcohol level ("BAC") of 0.107 four hours after defendant's arrest for DUI.

At a pre-trial hearing, the defense called a pharmacology expert who reviewed the evidence, including the test results, the dashcam of the stop and field sobriety tests, and defendant's statement that she was drinking in the hour before driving. According to the expert, a BAC test taken four hours after the stop could not prove a BAC over 0.08 at the time of driving, without knowing when the alcohol level peaked. The fact that defendant recently drank and did not exhibit signs of intoxication immediately after the stop, suggested she was still absorbing alcohol and that her BAC had not yet peaked. The expert concluded there wasn't sufficient information for a retrograde extrapolation, so there was no way to determine BAC at the time of the stop. The trial court found the results were inadmissible under Rule of Evidence 403, because, without retrograde extrapolation to show BAC at the time of driving, the risk of prejudice substantially outweighed any probative value.

The supreme court held the test results should have been admitted. It found the evidence was highly probative, as a BAC of 0.107 four hours after a traffic stop suggests defendant drank heavily before driving. And while defendant argued that prejudice could result if the jury believed the test constituted conclusive proof of a BAC over 0.08 at the time of driving, the court found the risk of substantial prejudice remote. Courts have previously held that evidence of a BAC greater than the legal limit does not require retrograde extrapolation, and that questions as to BAC at the time of driving go to weight rather than admissibility. The jury should be allowed to consider all of the evidence, including the test result and any expert opinion as to its meaning, and assign it the appropriate weight.

People v. Pikes, 2013 IL 115171 Defendant was charged with a murder that allegedly arose out of a conflict between two gangs. The feud began with the shooting of a member of defendant's gang. Then on the day prior to the murder, a rival gang member rode a scooter into the territory of defendant's gang. When Donegan, a member of defendant's gang, shot at the person on the scooter, he was struck by a car containing other rival gang members that

was following the scooter. Donegan then recruited defendant to assist him in exacting revenge by committing a drive-by shooting, which led to the murder for which defendant was convicted.

The Appellate Court reversed the conviction, finding that evidence of the scooter shooting was improperly admitted as other-crime evidence where there was no evidence connecting defendant to that incident.

The Illinois Supreme Court reversed the Appellate Court. Because it is undisputed that defendant was not involved in the scooter shooting, the scooter shooting is not evidence of another crime for purposes of evaluating its admissibility. The scooter incident was relevant to show defendant's motive for the subsequent murder. The fact that defendant may have had a secondary motive, the rival gang's shooting of defendant's fellow gang member, did not mean that he was not also motivated to retaliate for the scooter incident.

People v. Villarreal, 198 Ill.2d 209, 761 N.E.2d 1175 (2001) Gang membership evidence is admissible only where there is sufficient proof that the membership was related to the crime. Once a relationship is shown between gang activity and the crime, gang evidence may be admitted if relevant to an issue in dispute, provided the probative value is not substantially outweighed by the prejudicial effect. One purpose for which gang evidence is admissible is to provide a motive for the defendant's actions.

Where the State argued that the stabbing was not in self-defense, as defendant claimed, but was instead the result of gang-based violence, evidence of "various gang-related boasts and taunts . . . as well as the flashing of gang signs, substantiated [the State's] theory and helped to explain what occurred." Thus, the evidence was properly admitted. See also, **People v. Joya**, 319 Ill.App.3d 370, 744 N.E.2d 891 (1st Dist. 2001) (where there was "absolutely no testimony" of any gang involvement, "any inference that . . . mutual gang membership supported the State's theory that they acted in concert was cumulative and unnecessary" in view of overwhelming direct evidence); **People v. Davenport & Clemons**, 301 Ill.App.3d 143, 702 N.E.2d 335 (1st Dist. 1998) (gang-related evidence must relate to the crime charged in order to be admitted; while some of the gang testimony was relevant to explain the crime and establish motive, testimony regarding the background, history and criminal activity of rival gangs was "peripheral" to the offense and therefore more "troublesome"); **People v. Mathews**, 299 Ill.App.3d 914, 702 N.E.2d 291 (1st Dist. 1998) (in light of defendant's statement that he was a member of the Blackstones and an eyewitness's testimony that hostile gang symbols were exchanged before the shooting, there was a sufficient connection between the gang membership activity and the crime to admit evidence that several of defendant's acquaintances were Blackstones; unless defendant objects, however, the jury must be instructed, both when the evidence is admitted and at the close of trial, that gang-related testimony may only be considered for limited purposes).

People v. Cruz, 162 Ill.2d 314, 643 N.E.2d 636 (1994) Where a third party had confessed to the crimes with which defendant was charged, details of the third party's confessions to similar crimes should have been admitted both to show modus operandi and to corroborate the third party's claim that he had acted alone in committing the instant crime. The statements about the offenses with which defendant was charged were against the declarant's penal interest, and therefore were not inadmissible hearsay. See also, People v. Wilson, 149 Ill.App.3d 293, 500 N.E.2d 128 (3d Dist. 1986) (the defense is entitled to present evidence tending to show that someone else committed the crime if such evidence is not too remote or too speculative; evidence offered by the defendant was not remote since it showed an argument on the day of or the day before the murders, and was not speculative).

People v. Whiters, 146 Ill.2d 437, 588 N.E.2d 1172 (1992) At a trial for voluntary manslaughter, the trial court erred by excluding evidence that on the day before the offense, the decedent said he had beaten a certain women the previous night. The testimony was relevant to show defendant's reasonable belief in the need for self-defense.

People v. Nitz, 143 Ill.2d 82, 572 N.E.2d 895 (1991) At a trial for murder at which the State's theory was that the victim was killed because he was a homosexual, testimony showing that the defendant hated homosexuals and organized a motorcycle club to patrol an area frequented by homosexuals was relevant on the question of motive.

People v. Thompkins, 121 Ill.2d 401, 521 N.E.2d 38 (1988) At a trial for murder, a State witness's testimony that she had been the common law wife of the victim and that they had a one-year-old child was proper. The witness served as "a life and death witness for the purpose of establishing the identification of the decedent"; the isolated reference to the victim's family appeared to be incidental and not calculated to cause the jury to believe it was material to the question of guilt or innocence. See also, People v. Jimmerson, 127 Ill.2d 12, 535 N.E.2d 889 (1989) (evidence of the personal traits and characteristics of two murder victims was not presented in a manner that was calculated to cause jury to believe that it could be legitimately considered in determining guilt or innocence; the "great bulk" of the information "either was relevant and admissible" or "elicited from the witnesses in an incidental, nonprejudicial manner").

People v. Fierer, 124 Ill.2d 176, 529 N.E.2d 972 (1988) At the defendant's jury trial for the murder of his wife, the trial court did not err by admitting a newspaper clipping found in defendant's bedroom. The clipping dealt with a divorce-related homicide.

People v. Collins, 106 Ill.2d 237, 478 N.E.2d 267 (1985) "An agreement reached between an accomplice witness and the State to secure the witness' testimony is relevant because it goes to the credibility of the witness and the weight to be given his testimony."

People v. Stewart, 105 Ill.2d 22, 473 N.E.2d 840 (1984) Evidence of defendant's arrest several years before the murder for which he was on trial was relevant to show motive.

People v. Albanese, 104 Ill.2d 504, 473 N.E.2d 1246 (1984) Evidence that defendant solicited a third party to murder his brother and sister-in-law was proper because it "represented the ultimate step in defendant's plan to fabricate exculpatory evidence and, as such, constituted evidence of defendant's consciousness of guilt."

People v. Free, 94 Ill.2d 378, 447 N.E.2d 218 (1983) The trial court properly admitted evidence that an officer stopped defendant 24 hours before the crime in the vicinity of the crime, and that defendant was carrying a knife. Such testimony was relevant to place the defendant in the vicinity of the crime within 24 hours before it was committed, and was particularly relevant because defendant was an out-of-state resident who was residing in Iowa.

People v. Bartall, 98 Ill.2d 294, 456 N.E.2d 59 (1983) State's evidence describing gruesome details about the victim's injuries was proper because it tended to establish the location and nature of the injuries.

People v. Watson, 36 Ill.2d 228, 221 N.E.2d 645 (1966) Trial court committed reversible error at forgery trial by refusing to allow the defense to offer evidence that another traveler's check from the same stolen series had been signed and cashed after defendant was in custody.

Illinois Appellate Court

People v. Colone, 2024 IL App (1st) 230520 Defendant was convicted of two counts of murder and sentenced to two consecutive terms of 25 years in prison. On appeal, he argued that the trial court erred in denying his motion to bar a rap video he posted to Facebook Live. According to defendant, this rap video was not relevant to the case and was highly prejudicial, because it discussed gang life, shooting, drug use, and drug sales.

Citing **People v. Bush**, 2023 IL 128747, the appellate court determined that the rap video here bore a "strong nexus" to the facts of the case, making it relevant, with probative value that outweighed any prejudice. Defendant posted the video two months after the double murder, and in it he references a shooting of multiple people, the co-defendant, and the subject's refusal to use his guns, which was consistent with evidence that defendant was angry with the victims for owning guns but not joining in their gang war. The lyrics made several other references linked to the facts of the case. The trial court therefore did not abuse its discretion.

Nor was counsel ineffective for failing to object to the State's inclusion of a transcription with the video. Defendant argued that his counsel should have objected to the foundation and pointed out that some of the lyrics in the transcription sound incorrect. But a foundation objection could have been easily cured, and the errors identified by defendant were not material. Finally, the jury was instructed with IPI 3.20, which explains that transcriptions are merely what the transcriber believes was said, and the jury should primarily consider the recording itself. Thus, defendant could not show prejudice.

People v. Thornton, 2024 IL App (4th) 220798 The trial court did not err when it admitted social media messages and a prior inconsistent statement at defendant's murder trial. The messages showed defendant arguing with a member of the deceased's gang before the shooting, suggesting a motive. While defendant argued that this theory was too speculative, such that the prejudicial effect substantially outweighed any probative value, the appellate court disagreed. The conversation was three weeks before the shooting and showed the escalation of threats between the rival gangs. It was therefore relevant to show the beginning of a sequence of events that established defendant's motive for killing the deceased.

The court also properly admitted the prior inconsistent statements of a State witness. Defendant argued that the State failed to establish the "personal knowledge" requirement of section 115-10.1(c)(2), because in the prior statement, the witness stated that he saw defendant leave the car just before defendant shot the victim, but he did not say he actually witnessed the shooting. The appellate court held that this argument misconstrues the "personal knowledge" requirement – the knowledge refers to the events described in the prior statement. There is no requirement that the witness must have personal knowledge about all aspects of the crime. Rather, the statement cannot derive from information obtained from a third party. Because Davis's prior statement stated that he actually witnessed defendant leave the car, and implied that he saw defendant shoot the victim, the statement met the requirements of section 115-10.1(c)(2).

A special concurrence noted that, had the officers and State obtained the witness' prior statement under oath, the "personal knowledge" requirement would not have even come into play. See 725 ILCS 5/115-10.1(c)(1). This justice suggested the police and State should take witness statements before a grand jury or at a judicial hearing, such as a request for an arrest warrant. The justice described his own personal experience of driving to meet a witness and two police officers in a parking lot, entering the squad car, swearing in the witness, and taking the statement under oath before issuing an arrest warrant. Such a statement could be admitted at trial if inconsistent with the witness' trial testimony.

People v. Watts, 2022 IL App (4th) 210590 The trial court did not err in admitting evidence of defendant's prior sexual assaults of three other women pursuant to 725 ILCS 5/115-7.3. All three incidents shared facts in common with the charged offense. Specifically, defendant invited the women, who he knew, to hang out with him. Each rode in a vehicle with defendant, and all of the prior incidents involved the consumption of alcohol. Defendant assaulted each of the women at a time when they were unable to legally consent. While the charged incident did not involve alcohol, but rather a victim who could not consent because of her age, the differences were not enough to render the prior assault evidence more prejudicial than probative. And, while a significant amount of propensity evidence was admitted at defendant's trial, it did not amount to an improper "mini-trial" on the subject. The evidence was relatively straightforward, and was not "prosecutorial overkill" as in **People v. Cardamone**, 381 Ill. App. 3d 462 (2008).

Additionally, where the victim here claimed that defendant threatened self-harm in order to convince her to leave her home and meet him on the date in question, the court did not err in admitting evidence that defendant had made a similar threat to another individual on a prior occasion. That evidence showed defendant's use of such threats to manipulate others in order to get his way. Thus, his prior statements of self-harm were relevant, and it was not an abuse of discretion to admit them into evidence at trial.

Finally, the trial court did not err in allowing the State to introduce evidence of memes found on defendant's phone. The State asserted that the memes showed defendant's belief that it was appropriate to sexually assault incapacitated women. For authentication purposes, the court treated the memes like any other form of documentary evidence. A proper foundation for documentary evidence will be found where the proponent presents a rational basis from which a fact finder can conclude that the document belonged to or was authored by the party alleged. Here, there was no dispute that the phone belonged to defendant, and there was evidence that the memes were contained in text messages defendant exchanged with another person. Thus, there was evidence that the memes belonged to him, even if defendant did not author them. This was enough to render the memes admissible, and it was for the trier of fact to determine what weight to give them.

People v. Walker, 2021 IL App (4th) 190073 At defendant's trial for predatory criminal sexual assault, the complainant's father testified that he was suspicious of defendant based on the time defendant spent with the complainant. The prosecutor asked the complainant's father how news of the complainant's allegations affected him emotionally. He testified that it made him "sick," that he didn't want to believe it, and that it confirmed his suspicions. Defendant, asking for plain error review, alleged that the court erred in admitting this testimony. He alleged the prejudicial effect of the father's testimony about his emotional reaction outweighed its probative value, that the father's description of his suspicions constituted improper lay opinion testimony, and that the father's beliefs as to what occurred improperly opined on the ultimate question of fact for the trier of fact.

The Appellate Court disagreed. The father provided several concrete examples of observations that had aroused his suspicion, and Rule of Evidence 701 expressly permits a witness to testify about his or her perceptions. His emotional reaction represented his state of mind at the time of the disclosure, another proper area of testimony that was relevant to provide context for his decision to subsequently confront defendant. Notably, state of mind testimony is admissible even if hearsay; here, the witness was on the stand and available for cross-examination. Finally, it is now "well settled" that expert or lay witness opinions on an ultimate fact or issue are admissible.

People v. Hardimon, 2021 IL App (3d) 180578 Defendant was convicted of murder after he was identified as the perpetrator of a shooting outside a night club. At his trial, one witness, a bouncer, testified that as he escorted defendant out of a club, he heard defendant say he would "light this bitch up." The bouncer testified that based on his familiarity with street slang, he understood the comment to mean that there would be some "gun play." Defendant argued on appeal that this comment constituted improper lay opinion testimony. Defendant further alleged that aspects of his videotaped statement, in particular the commentary and accusatory questioning of the officers, was overly prejudicial.

The Appellate Court rejected these claims. Illinois Rule of Evidence 701 states that "lay witnesses may offer opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge." The Appellate Court found the bouncer's testimony was proper lay opinion. It was rationally based on his familiarity with street vernacular. The statement was helpful to the determination of the fact of the defendant's guilt in that there was, in fact, some "gun play." The statement was not based on scientific, technical, or specialized knowledge.

Nor did the court err in admitting certain portions of defendant's videotaped interrogation which he alleged to be overly prejudicial. In a prior appeal, the appellate court deemed the interrogation prejudicial, based on officer comments and accusations, after approximately 26 minutes. At the second trial, the parties argued over whether the jury should see beyond the 25:46 mark or the 28:35 mark. In between, the interrogating officers presented defendant with their theory of the case, accusing him of shooting the victim after an argument in the bathroom of the nightclub, and told defendant a witness could identify him entering a Mitsubishi after the shooting. The Appellate Court found these officer statements admissible as allowable interrogation techniques, and noted that defendant admitted to being in the Mitsubishi, making this portion of the interrogation relevant.

People v. Rudd, 2020 IL App (1st) 182037 When the State seeks to establish a defendant's motive by introducing evidence of an insurance policy on the victim's life, it must "provide evidence that the accused knew of the policy, knew it was valid, or believed it was valid, and knew that [he] would benefit therefrom." Thus, life-insurance-as-motive evidence is governed by the conditional relevance provision of Rule of Evidence 104(b). Under this rule, the question is, after examining all of the evidence, "whether the jury could reasonably find the conditional fact *** by a preponderance of the evidence."

Here, the trial court did not abuse its discretion when it admitted evidence of defendant's deceased wife's life insurance policies. The court rejected defendant's argument that the State failed to establish the defendant's knowledge of the policies. The couple worked for the same company, and when asked whether the deceased had insurance, defendant admitted that most people who worked for their company did have insurance. And the

changes in the deceased's policy in the one month between their marriage and her death, naming defendant as primary beneficiary, and adding a benefit for accidental death, required an active step on her part. It was not unreasonable to presume that the matter would have been discussed between a
married couple.

People v. Schlott, 2019 IL App (3d) 160281 Writings found in defendant's home office after the offense were admissible despite not knowing exactly when they were written. The time-frame was narrowed to a six-week window, and the writings included lists in preparation for the offense, as well as letters of apology to various family members. The content of the writings showed their relevance, and the foundation was adequate where defendant's handwriting was identified and the letters had been recovered from defendant's office.

People v. Whitfield, 2018 IL App (4th) 150948 Admission of defendant's video recorded interrogation was not error even though the recording also included statements by the interrogating officers suggesting that defendant was not credible and opining that the State's case against him was strong. The officers' statements on the video were not offered for their truth, but rather provided context for the interrogation, so they were not hearsay. Similarly, the officers' statements were not improper opinion testimony because the video recording was not testimony. Unlike **People v. Hardiman**, 2017 IL App (3d) 120772, where the court improperly admitted portions of an interrogation consisting of prejudicial police accusations and defendant's denials, the defendant here made admissions throughout the duration of the videotaped statement, making the officers' accusations relevant.

People v. Clark, 2018 IL App (2d) 150608 Evidence of a witness's commission of another crime is not analyzed as "other crimes" evidence under Illinois Rule of Evidence 404(b). Instead, admissibility is evaluated under ordinary relevance principles. Here, defendant admitted participating in a robbery with the co-defendant, Nesbit, where Nesbit brandished a firearm. The sole issue before the jury was whether the gun displayed by Nesbit was real. At defendant's trial, Nesbit testified for the State. Nesbit's recent prior commission of an armed robbery with a real firearm was deemed relevant. Defendant's jury could reasonably infer use of a real firearm in this case based upon Nesbit's use of a real firearm in the prior armed robbery. The prejudicial impact of Nesbit's prior armed robbery did not outweigh its probative value where its use at defendant's trial was limited to the issue of whether the gun was real.

People v. Davis and People v. Graham, 2018 IL App (1st) 152413 The trial court did not abuse its discretion in admitting gang evidence. The State provided evidence that the shooting was gang motivated, and therefore gang evidence was relevant. The State did not call an expert on gang evidence or inundate the jury with gang evidence, and therefore the gang evidence was not overly prejudicial. Although evidence suggested that co-defendant Davis was in a different gang from the two gangs at war, evidence did show that co-defendant Graham was in one of the two warring gangs and that Davis acted in concert with Graham.

People v. Betance-Lopez, 2015 IL App (2d) 130521 Generally, the trial court may admit a written transcript of a recording to assist the trier of fact. However, it is the recording itself, and not the transcript, that constitutes evidence.

The court concluded that the general rule is "impractical, or even impossible," where the recording contains statements in a foreign language. In such a case, it is not possible for

the trier of fact to rely on the recording to the exclusion of an English translation. Thus, where the recording contained questions and answers in Spanish which were then translated by one of the officers conducting the interrogation, the trial court did not err by admitting a subsequently prepared English transcript as substantive evidence.

The court rejected the argument that because the recording contained the officer's English translation of statements which defendant made in Spanish, the trial court should not have relied on the subsequently-prepared transcript. The court noted that the translator who prepared the transcript had the luxury of listening to the recording, multiple times if necessary, to ensure that the translation was accurate. In addition, defendant conceded that there was a proper evidentiary foundation for the transcript. Under these circumstances, the trial court did not err by admitting the transcript.

People v. Jaimes, 2014 IL App (2d) 121368 Gang-related evidence need not be excluded where it is relevant to an issue in dispute and the probative value is not substantially outweighed by the prejudicial effect. The trial court's decision regarding the admission of gang-related evidence will not be disturbed unless there was an abuse of discretion.

Here, gang-related evidence was admissible because the State's theory was that the offense occurred as a result of an altercation between rival gangs. In addition, evidence that defendant identified himself as a member of a gang was admissible although the jury was informed that the admission was made to an employee at a juvenile detention facility and thus learned that defendant was involved in the juvenile justice system. The court noted that the employee did not testify to the reason defendant was being detained and that the evidence merely satisfied the requirement that the State establish a proper foundation for the testimony.

The court noted, however, that it was unnecessary for the State to introduce testimony by a second correctional officer concerning a separate admission by defendant that he was a gang member. Although the gang-related evidence introduced in this case was not excessive or unduly prejudicial, by presenting the duplicative testimony of a second witness the State came "close to crossing that forbidden threshold." The court stated that in the future, the State should be "more circumspect" in its use of such cumulative evidence.

Defendant's conviction for first degree murder and attempt first degree murder were affirmed.

People v. Degorski, 2013 IL App (1st) 100580 Occupation (reputable or disreputable) is an ordinary part of the background information elicited from any witness, and is properly considered in determining the weight to be given to the testimony of the witness.

It was not an abuse of discretion for the court to allow the former assistant State's Attorney who obtained a confession from the defendant to testify that he was now a judge, particularly where the State complied with the court's direction that it not give that fact undue emphasis, and the State did not argue that the jury should give the testimony of the witness greater weight because he was a judge. While a judge's occupation may lend an air of credibility to his testimony, the trier of fact is still free to disbelieve the witness.

Much like police officers, assistant State's Attorneys are authority figures whose testimony may be prejudicial if they inform jurors that they should believe the prosecution's case. But there is a distinction between an assistant State's Attorney testifying to a prior opinion of belief in a defendant's statement at the time it was made, and offering a present opinion of defendant's guilt at trial. Present opinion testimony is improper; previous opinion testimony is permissible.

The testimony of a former assistant State's Attorney that he believed defendant's confession at the time of its making was not a present opinion of defendant's guilt and was permissible.

People v. Roman, 2013 IL App (1st) 110882 Evidence that defendant was a gang member or involved in gang-related activities is admissible to show a common purpose or design, or to provide a motive for an otherwise inexplicable act. However, due to the possibility of strong prejudice against street gangs, gang-related evidence is admissible only if there is adequate proof that membership or activity in the gang is related to the crime charged. The trial court must take great care in admitting gang-related testimony.

The trial court erred at a trial for first degree murder by admitting testimony from eyewitnesses that defendant was a member of the Latin Kings. The Court rejected the State's argument that such evidence strengthened eyewitness identifications of the defendant as one of the perpetrators. Although two of the eyewitnesses stated that they knew defendant was a gang member, none of the eyewitnesses based their identifications of defendant on that fact. Instead, the witnesses stated that they recognized the perpetrators of the offense because they had seen them in the neighborhood for several years. Thus, gang membership was not related to the identifications.

Similarly, the trial court improperly admitted photographs of defendant's tattoos and testimony from a police officer that the tattoos showed that defendant was a member of the Latin Kings. Although the judge also admitted this evidence to corroborate eyewitnesses' identifications, none of the witnesses mentioned the tattoos or suggested that the tattoos were an aid in identifying defendant as one of the perpetrators. Thus, the evidence was not relevant to the identifications and had the effect of inflaming the jury.

Furthermore, the gang evidence was not admissible to support the State's theory that the murder was gang related. The State argued that the perpetrators killed the victim to avenge a perceived slight to the Latin Kings a few weeks earlier, when workers at the factory where the offense occurred gave shelter to a man who was being beaten. The court stressed that the State failed to present any evidence to show that the instant offense was intended as retaliation for a perceived slight. In addition, there was no evidence that either this incident or the prior one was gang related, as there was no testimony that the perpetrators flashed gang signs, yelled gang slogans, or otherwise indicated that they were members of a gang.

Finally, the trial judge erred by denying defense counsel's request to remove a "Gang Unit" sticker from the State's courtroom cart, especially since the State had no objection. Given the strong risk of prejudice that is inherent whenever a jury is exposed to gang-related evidence, the presence of the sticker on the cart had the potential to negatively impact the defense. The court stated, "Whether the case involves gang affiliation or not, fairness dictates that the cart be identified with a sticker that does not transmit a potentially prejudicial message, especially when an innocuous alternative is so easy."

People v. Fillyaw and Parker, 409 Ill.App.3d 302, 948 N.E.2d 1116 (2d Dist. 2011) The mental health history of a witness may be relevant if it relates to the credibility of the witness. Witness Deshae R.'s psychiatric diagnosis, treatment with psychotropic medications, and experience with hallucinations may be relevant to her credibility as a witness. Therefore the circuit court was directed to conduct a further *in camera* review of her mental health records on remand, and tender to the defense attorneys the relevant portions of those documents.

People v. Santiago, 409 Ill.App.3d 927, 949 N.E.2d 290 (1st Dist. 2011) Just as evidence of a co-defendant's confession is inadmissible as evidence of defendant's guilt, evidence that a co-defendant pleaded guilty or was convicted is inadmissible as evidence of defendant's guilt. A defendant is entitled to have his guilt or innocence determined based on the evidence against him without being prejudged according to what has happened to another. **People v. Sullivan**, 72 Ill.2d 36, 377 N.E.2d 17 (1978).

The court held that this rule was not violated where the prosecutor elicited from the co-defendants that they had pleaded guilty, but in the context of admitting statements that they had made at their plea hearings acknowledging the accuracy of their post-arrest statements. The post-arrest and guilty-plea statements inculpating defendant were admitted as substantive evidence pursuant to 725 ILCS 5/115-10.1 as they were inconsistent with the co-defendants' testimony at trial. The State never argued to the jury or even suggested that the co-defendants' guilt was evidence of defendant's guilt.

Nor was it error to elicit evidence of the sentences that the co-defendants received. The jury was not informed of the sentences for the improper purpose of suggesting that defendant faced a comparable sentence if convicted, but to emphasize the doubtful explanation offered by the co-defendants for their decision to plead guilty.

It was also not error for the prosecutor to elicit evidence that defendant was not present when the co-defendant pleaded guilty. This evidence was offered to provide a plausible explanation for the co-defendant's contrary testimony at trial, i.e., that defendant's absence at the plea hearing made it easier for the co-defendant to testify to defendant's guilt, and defendant's presence at trial made it difficult for the co-defendant to repeat that testimony.

Justice Robert E. Gordon specially concurred. It was error, although harmless, to elicit evidence of co-defendants' guilty pleas, where it was not necessary to elicit that evidence in order to introduce the prior inconsistent statements they made at the plea hearing.

People v. Garcia-Cordova, 2011 IL App (2d) 070550-B The trial court did not err by denying a motion *in limine* to exclude portions of defendant's statements to police which indicated that he had been sexually abused as a child. Evidence is admissible if it is relevant to an issue in dispute and the probative value is not substantially outweighed by the prejudicial effect. Evidence is relevant if it tends to make the existence of a fact that is of consequence to the proceeding either more or less probable than would otherwise be the case. The trial court has discretion to determine whether evidence is relevant and admissible.

The court concluded that defendant's history of having been sexually abused as a child was relevant in two respects: (1) in evaluating the credibility of defendant's statements to police, and (2) concerning the context in which those statements were made. The court noted testimony that defendant's demeanor changed after he admitted having been sexually abused as a child, and that he then made the written and oral statements that were admitted at trial.

People v. Atherton, 406 Ill.App.3d 598, 940 N.E.2d 775 (2d Dist. 2010) In a prosecution for predatory criminal sexual assault, a child welfare supervisor who worked for a private social services agency testified to the characteristics of child-sexual-abuse-accommodation syndrome that are often observed in children who have been sexually abused. The Appellate Court addressed three issues related to the admissibility of that evidence.

Evidence is admissible when it is relevant to an issue in dispute and its probative value is not substantially outweighed by its prejudicial effect. Evidence is considered relevant

when it has any tendency to make the existence of any fact that is of consequence to the determination of an action more or less probable than it would be without the evidence.

Testimony regarding child-sexual-abuse-accommodation syndrome was relevant. Few jurors have sufficient familiarity with child sexual abuse to understand the dynamics of a sexually-abusive relationship. The defense attacked the credibility of the child witness by introducing evidence of her delayed reporting and inconsistencies in her testimony. The syndrome evidence aided the trier of fact in weighing that evidence.

People v. Hanson, 238 Ill.2d 74, 939 N.E.2d 238 (2010) The trial court did not err by admitting a detective's testimony that while talking to the defendant, he stated that defendant's sister believed defendant had committed the murders. Whether evidence is relevant and should be admitted is left to the discretion of the trial court, whose decision will not be overturned unless it is arbitrary, fanciful or unreasonable. Here, the trial court did not abuse its discretion by admitting the evidence.

The court rejected the argument that the testimony was improper opinion evidence. Neither the detective nor the sister testified about the sister's present opinion of defendant's guilt or innocence. Instead, the evidence concerned a conversation which occurred immediately after the offenses, when the sister reported to police that defendant might have been responsible.

The evidence was relevant in that it explained why the investigation had focused on the defendant, and answered defendant's earlier question to the officer about why he was being questioned. In addition, the sister's belief was relevant to explain defendant's actions after talking to the police officer, including his unannounced return to Illinois from California and drive to Wisconsin, where he was arrested. The fact that defendant knew that his sister had shared her suspicions with the police made it more likely that he was attempting to flee.

The evidence was not hearsay. An out-of-court statement is admissible if offered for some purpose other than to establish the truth of the matter asserted. The evidence was not offered to prove that defendant was guilty, or even to prove that the sister thought he was guilty. Instead, it was intended to provide context for the investigation and explain defendant's state of mind when he returned to Illinois.

The evidence should not be excluded because the danger of unfair prejudice outweighed any probative value. The court noted that the sister was not an authority figure whose opinion was likely to be especially persuasive to the jury, the jury was not likely to believe that the sister was "uniquely knowledgeable" about defendant's role in the offense, and at no point did any witness testify that he or she believed defendant to be guilty.

People v. Maldonado, 398 Ill.App.3d 401, 922 N.E.2d 1211 (1st Dist. 2010) Evidence of gang-related activity is admissible only where there is sufficient proof that such activity is related to the crime charged. Here, the trial court admitted the evidence for the limited purpose of impeaching two of the State's witnesses who had recanted their pretrial statements. Although the State acknowledged that it lacked evidence to show that the crime was gang-related, it presented additional gang evidence that had nothing to do with the impeachment of the witnesses. In addition, it used that evidence in closing argument to suggest a possible gang motive for the offense.

Because the improperly-admitted evidence may have affected the verdict, a new trial was required.

The trial court erred by allowing the State to introduce evidence that a shotgun was recovered from defendant's residence, because the offense had been committed with a handgun and no connection was shown between the weapon and the defendant. In the court's

view, the State introduced the evidence solely to suggest that the shotgun must have belonged to the defendant, and that "someone who possesses a shotgun is more likely to commit a murder than someone who does not."

Evidence that a witness made a prior consistent statement is generally inadmissible for the purpose of corroborating trial testimony, unless the opposing party contends that the witness recently fabricated his or her testimony and the prior statement was made before the alleged motive to fabricate arose. Here, the trial judge improperly admitted prior consistent statements which were made after the alleged motive to fabricate came into existence.

Defense counsel argued that when the witness was first interviewed by police, she truthfully said that she had no knowledge of the offense. Counsel alleged that after being detained at the police station for several hours, the witness falsely inculpated the defendant. Counsel also argued that the witness repeated the false accusation in her testimony before the grand jury and at trial.

Because the statements which were admitted to corroborate the witness's trial testimony - her statement at the police station and her grand jury testimony - were both made after the motive to falsify arose, they did not rebut counsel's allegations and should not have been admitted.

Defendant's conviction for first degree murder was reversed and the cause remanded for a new trial.

People v. Bryant, 391 Ill.App.3d 228, 907 N.E.2d 862 (5th Dist. 2009) The trial court did not abuse its discretion by admitting redacted recordings of videotapes showing the interrogations of the defendants by police, although the defendants refused to make any statements.[1] Because the trial court viewed the tapes, sustained objections to specific portions on relevancy grounds, and ordered those portions redacted, it did not abuse its discretion by admitting evidence which had at least some probative value that was "not outweighed by any prejudicial" effect. (See also **COUNSEL**, §13-4(a),(c)).

People v. Family Video Movie Club, Inc., 318 Ill.App.3d 991, 744 N.E.2d 322 (5th Dist. 2001) To determine whether a work is obscene, the trier of fact must determine that: (a) the average person, applying contemporary community standards, would find that the work as a whole appeals to a prurient interest, (b) the work depicts or describes in a patently offensive way sexual conduct specifically defined by the applicable law, and (c) the work as a whole lacks serious literary, artist, political or scientific value. Although the State need not introduce evidence concerning contemporary community standards, the defense is entitled to introduce the best evidence it can on this issue.

Where a video rental store was alleged to have violated an obscenity ordinance by renting particular tapes, the trial court erred by refusing to admit: (a) a survey conducted by store personnel in which patrons indicated their support of or opposition to the store's rental of adult videos, and (b) a survey conducted by a law clerk to determine whether similar videos were available at other stores in the region. Although exclusion of the survey conducted by store personnel was harmless error in view of the obvious "flaws in the methodology," exclusion of the survey conducted by the law clerk was not harmless error. Although mere availability of similar materials in a particular area does not necessarily demonstrate that such materials are acceptable to average members of the community, "the availability of the

[1]The State argued that the recordings were relevant to demonstrate that defendants had multiple opportunities to explain to police "what had happened," and that the defendants' "body language" during the interrogation was also relevant.

same or comparable materials . . . may indicate that the challenged materials enjoy a 'reasonable degree of community acceptance.'"

People v. Criss, 307 Ill.App.3d 888, 719 N.E.2d 776 (1st Dist. 1999) Where an entrapment defense was raised, the trial judge erred by excluding evidence that defendant had no prior criminal record. Predisposition to commit an offense is an important consideration in proving entrapment, and a prior criminal record (or lack thereof) is relevant to predisposition.

The trial judge did not abuse his discretion by admitting a tape-recorded conversation where an "unintelligible" gap at a critical point in a conversation, was not so substantial as to render the recording untrustworthy as a whole. However, the judge erred by failing to instruct the jury that transcripts were merely the prosecution's representation of the conversation and were provided only as an aid in listening to the tapes.

People v. Bruce, 299 Ill.App.3d 61, 701 N.E.2d 63 (1st Dist. 1998) Generally, a weapon that could have been used to commit an offense is competent and may be admitted. If a person accused of a crime is arrested in possession of a weapon suitable to commit the crime, the weapon is admissible even if the State cannot establish that it was used in the offense.

Although the accomplice claimed that the murder weapon had a brown handle, there was also testimony that the weapon had a black handle. In view of this conflicting evidence, the weapon was properly admitted pursuant to the doctrine of conditional relevance. Under that doctrine, if the relevance of a piece of evidence depends on the truth of some other fact, the evidence is admissible if there is sufficient evidence in the record to support a finding by a reasonable juror that the factual condition has been fulfilled. Compare **People v. Jackson**, 299 Ill.App.3d 323, 702 N.E.2d 590 (5th Dist. 1998) (it was plain error to admit a handgun where the State failed to show that the weapon was suitable for commission of the offense, was similar to the weapon, or even that the complainant had been shot with a handgun).

People v. Booker, 274 Ill.App.3d 168, 653 N.E.2d 952 (1st Dist. 1995) At his trial for murder, defendant admitted killing the deceased but claimed he did so in self-defense. The Appellate Court reversed the conviction because the trial court refused to allow the defense to present evidence that he feared the deceased, had seen the decedent act violently, and knew that the decedent had previously been charged with murder. See also, **People v. Cross**, 272 Ill.App.3d 354, 650 N.E.2d 1047 (1st Dist. 1995) (trial judge erred by refusing to allow defendant to testify that he carried the gun because he feared for his life; because a defendant is entitled to use deadly force that he or she reasonably believes to be necessary to prevent death or great bodily harm, defendant's subjective state of mind is necessarily at issue whenever self-defense is raised; a defendant's direct testimony of his or her state of mind is relevant).

People v. Montes, 263 Ill.App.3d 680, 635 N.E.2d 910 (1st Dist. 1994) A new trial was ordered because the lower court erroneously excluded defendant's testimony about his own state of mind and refused to allow testimony concerning the interrogating officer's ability to speak Spanish.

Because an essential element of self-defense is that the defendant subjectively believed that his use of force was necessary, statements probative of the defendant's state of mind are clearly relevant when self-defense is raised. Defendant's testimony concerning a previous beating, which led him to buy the knife used here, should have been admitted.

The trial judge also abused his discretion by refusing to allow the defendant to cross-examine the interrogating officer about his ability to speak Spanish or testify about

difficulties defendant had understanding the officer. The officer claimed that defendant gave a statement in Spanish that did not claim self-defense; however, the officer admitted that he did not write Spanish very well. Because the officer and defendant disagreed as to the content of defendant's pretrial statement, the jury was required to determine the weight of defendant's claim that the officer's inability to understand Spanish caused him to misinterpret the statement. The proposed evidence was clearly relevant to this question, and therefore should have been admitted.

People v. Carter, 244 Ill.App.3d 792, 614 N.E.2d 452 (1st Dist. 1993) It was proper to allow five-year-old complainant in sexual assault case to testify with the aid of an anatomically correct doll. At a pretrial competency hearing, the witness had trouble correctly identifying body parts without using the doll. Use of the doll was also more probative than prejudicial because the witness was of tender years, the doll was used only to identify body parts, the judge had to keep asking the witness to speak up, and an interpreter was necessary because the witness had difficulty speaking English.

People v. James, 200 Ill.App.3d 380, 558 N.E.2d 732 (4th Dist. 1990) At the defendant's trial for attempt aggravated criminal sexual assault, the State was allowed to introduce testimony that about three months before the incident, defendant saw the victim and said, "I'm going to get me some of that."

The Appellate Court held that the above testimony was proper; threats by the accused against the victim are admissible as showing malice and intent. Furthermore, the circumstances of the threats, their repetition and the lapse of time affect weight but not admissibility.

People v. Banks, 192 Ill.App.3d 986, 549 N.E.2d 766 (1st Dist. 1989) Where defendant claimed that his confession was the result of police torture, evidence that the same officers had tortured another suspect was relevant.

People v. Mays, 188 Ill.App.3d 974, 544 N.E.2d 1264 (5th Dist. 1989) Evidence of attempt by State witness to commit suicide while in the county jail should have been admitted because it was relevant to the witness's credibility.

People v. Hoddenbach, 116 Ill.App.3d 57, 452 N.E.2d 32 (1st Dist. 1983) The exclusion of testimony about prior threats by the decedent was error where the defendant's claim of self-defense was based in part on the threats.

People v. Dennis, 373 Ill.App.3d 30, 866 N.E.2d 1264 (2d Dist. 2007) Where defendant alleged self-defense, the trial court erred by denying a motion to admit evidence of the victim's propensity for violence and reputation for violence.

§19-2(b)(2)
Irrelevant or Unduly Prejudicial Evidence

United States Supreme Court
Old Chief v. U.S., 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997) Where the relevancy of a prior conviction was limited to establishing defendant's legal status and there was a likelihood the jury would use the details of the prior crime to find that defendant probably committed the crime in question, "the only reasonable conclusion" is that the risk of unfair

prejudice substantially outweighed the probative value of the evidence. Under such circumstances, the trial court abused its discretion by admitting the full record of the prior conviction instead of allowing the defendant to concede that the statutory requirements had been satisfied. See also, **People v. DeHoyos**, 64 Ill.2d 128, 355 N.E.2d 19 (1976) (admission of evidence concerning the prior conviction of a friend of the defendant was reversible error where the testimony included not only the fact of the conviction, but also the sentence imposed and that the friend served the entire sentence; prejudicial effect of such evidence outweighed its probative value); **People v. Walker**, 211 Ill.2d 317, 812 N.E.2d 339 (2004) (adopting the reasoning of **Old Chief**; where a prior felony conviction is introduced solely to prove the defendant's status as a convicted felon, the precise name and nature of the prior conviction present a risk of prejudice that outweighs the probative value; trial court erred by admitting the name and nature of the prior conviction rather than accepting a defense offer to stipulate); People v. Harris, 343 Ill.App.3d 1014, 798 N.E.2d 1259 (**Walker** is not limited to situations in which the evidence of guilt is not overwhelming).

Illinois Supreme Court

People v. King, 2020 IL 123926 It was not error for the victim's sister to testify that the victim had been like a mother to her and had helped her shop for a wedding dress. These isolated comments were part of the introductory information given very early in the witness's testimony and formed the basis for the witness's familiarity with the victim's habits and patterns. It was error, however, for both the victim's sister and father to testify to the emotional reactions they had upon learning of the victim's death. That testimony was of no probative value. Further, it came toward the end of each witness's time on the stand and "formed the climax of the State's examination of both of these witnesses, and the State clearly intended for their understandably emotional responses to make a strong and lasting impression on the jury." Because the matter had already been reversed and remanded for a new trial on other grounds, the Court made clear that such testimony should not be repeated on retrial.

People v. Wheeler, 226 Ill.2d 92, 871 N.E.2d 728 (2007) Evidence that a crime was committed by someone other than the defendant is admissible, although such evidence can be excluded if it is too remote in time or too speculative to shed light on the case. Admitting such evidence constitutes an abuse of discretion where the trial court's ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court.

The trial court did not abuse its discretion by excluding evidence that a third party had a motive to commit the crime where the evidence was speculative.

People v. Bolden, 197 Ill.2d 166, 756 N.E.2d 812 (2001) Evidence is relevant if it has a tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. The trial court did not err by refusing to admit defense counsel's testimony that in other cases, officers conducting lineups had allowed him to be in the same room as the identifying witnesses.

The lawyer's testimony about lineups in other cases "had no bearing on the conduct of the detectives in this case or their reasons for not permitting counsel to be present during the lineup." In addition, there was no showing that the detectives in this case had been involved in the cases about which the attorney would testify.

People v. Blue, 189 Ill.2d 99, 724 N.E.2d 920 (2000) The trial court abused its discretion by allowing the State to introduce a headless mannequin wearing the bloody and brain-splattered uniform of a deceased police officer, and by allowing the exhibit to be taken to the jury room.

Generally, an article of clothing is admissible if it tends to prove facts material to the issues and its probative value is not outweighed by the potential prejudice. Whether articles of clothing are admissible in a particular case rests within the trial court's discretion.

The State argued that the uniform was admissible to show that defendant knew he was firing at a police officer and to show intent to kill (because defendant had intentionally fired above the officer's bulletproof vest). The court held that the probative value of the uniform on these points was outweighed by the prejudicial effect.

Although the fact that the complainant was a police officer would have been relevant to an attempt murder charge, it had no relevance to first degree murder charges. Furthermore, it made "no sense" to display the uniform on a headless mannequin if the State wanted to show that defendant intended to shoot at the officer's head. Third, the court found that there was ample evidence in the record, both through testimony and autopsy pictures, to document the placement and appearance of the decedent's wounds without introducing the uniform.

The evidence was extremely prejudicial. A uniform containing stains from the decedent's blood and brain matter is "uniquely 'charged with emotion.'" In addition, the jurors were exposed to the mannequin for an extended period of time, not only in the courtroom but also during deliberations, and were given rubber gloves to facilitate handling the exhibit in the jury room. Under these circumstances, the "nature and presentation of the uniform rendered the exhibit so disturbing that its prejudicial impact outweighed its probative value."

People v. Mulero, 176 Ill.2d 444, 680 N.E.2d 1329 (1997) The fact that the defense filed a motion to suppress a confession had no relevancy to whether defendant lacked remorse for the crime.

People v. Lewis, 165 Ill.2d 305, 651 N.E.2d 72 (1995) At a murder trial, the trial court erred by admitting evidence that at the time of her death the decedent was five months pregnant with a female fetus. Evidence is relevant if it makes the existence of any fact of consequence "more probable than it would be without the evidence." However, even relevant evidence should be excluded if its prejudicial effect substantially outweighs its probative value.

The Court concluded that the victim's pregnancy "bore absolutely no relationship" to the question of guilt or innocence, but prejudiced the defendant by creating "an unnecessary risk of undermining the fairness and impartiality of the proceeding." However, because the prosecutor asked only one question and did not "dwell" on the pregnancy, and because the evidence was presented as part of the medical examiner's autopsy testimony, the evidence did not so "substantially compromise" a fair trial that it was prejudicial error.

People v. Lucas, 151 Ill.2d 461, 603 N.E.2d 460 (1992) At defendant's trial for the murder of a superintendent at Pontiac Correctional Center, the State's theory was that members of a prison gang killed the superintendent in revenge for the death of a fellow gang member. The Supreme Court found that the trial judge erred by admitting evidence of gang threats against a guard who had been involved in the incident which led to the death of the gang member, where the threats occurred two weeks before this offense and could not be traced to the defendant.

The trial court also erred by admitting evidence that gang members other than defendant attacked a correctional officer on the day before the superintendent's murder and had plotted to kill an inmate who had cooperated with prison officials; this evidence was erroneously admitted because it was never shown that defendant was involved in either the attack or the plot. See also, **People v. Easley**, 148 Ill.2d 281, 592 N.E.2d 1036 (1992) (it was error to allow the State to introduce evidence of a gang conspiracy, as evidence of defendant's motive for a murder, where there was no showing that defendant knew of the conspiracy).

People v. Hendricks, 137 Ill.2d 31, 560 N.E.2d 611 (1990) At defendant's trial for the murder of his wife and children, the State improperly manipulated evidence by presenting testimony in a non-chronological order to make it appear that defendant engaged in increasingly aggressive sexual conduct with women he employed to model back braces he sold. "When the . . . testimony is considered in its proper order, it presents no more than a haphazard series of encounters."

The Court also found that the record "suggests that the prosecution's purpose in presenting the testimony about the models was aimed at inflaming the jury's passions against the defendant." Furthermore, the prosecutor misrepresented the evidence, which had been admitted for the limited purpose of motive, "to portray the defendant as having an evil disposition." See also, **People v. Kannapes**, 208 Ill.App.3d 400, 567 N.E.2d 377 (1st Dist. 1990) (at trial for delivery of cocaine, both a photograph which showed the defendant wearing a tee-shirt which parodied a Coca-Cola advertisement and contained the legend "Enjoy Cocaine" and defendant's post-arrest request that a police officer return the photograph had negligible probative value and seriously prejudiced the defense; even had the evidence been relevant to show motive, intent, identification or absence of mistake, it should have been excluded because its probative value would have been substantially outweighed by its prejudicial effect).

People v. Henderson, 142 Ill.2d 258, 568 N.E.2d 1234 (1990) At the defendant's trial for murder, it was error for the State to introduce the defendant's entire confession where a portion of it referred to defendant's intent to murder another person. The latter portion was not relevant in the instant case and should have been redacted.

People v. Hope, 116 Ill.2d 265, 508 N.E.2d 202 (1986) Evidence that a murder victim left a spouse and family "has no relationship to the guilt or innocence of the accused, but normally serves only to prejudice the defendant in the eyes of the jury." See also, **People v. Brown & Harper**, 253 Ill.App.3d 165, 624 N.E.2d 1378 (1st Dist. 1993) (testimony by widow of one of the decedents that the victim left a young child and that the witness had just undergone major surgery at the time of the offense and had been unable to go to the morgue to identify her husband's body had no proper purpose - the witness identified neither the victim's body nor his photograph at trial, and thus failed to establish his identity or the fact that he was deceased); **People v. Starks**, 116 Ill.App.3d 384, 451 N.E.2d 1298 (1st Dist. 1983) (the State may present "life and death" witnesses, but such testimony must be presented without "placing undue emphasis on the fact that the deceased has left a family behind").

People v. Williams, 109 Ill.2d 327, 487 N.E.2d 613 (1985) The trial court erred in prohibiting defendant from introducing a tape recording of his statement after police officers testified as to the content of the statements. The part of the statements excluded from

evidence — the defendant's demeanor and voice inflections — could have affected the jury's assessment as to the credibility of the statements.

People v. Mitchell, 105 Ill.2d 1, 473 N.E.2d 1270 (1984) Testimony that defendant had bought an insurance policy on her 16-month-old daughter should not have been admitted at defendant's trial for attempt murder and aggravated battery against the daughter. Although "any evidence which tends to show that an accused had a motive for killing is relevant[,] . . . with reference to insurance policies, this Court has required proof of the existence of such a policy and its relationship to the defendant." Here, the State failed to prove "that the policy was in force at the time of these offenses, and there was no evidence that the policy played any role in the defendant's actions."

People v. Lampkin, 98 Ill.2d 418, 457 N.E.2d 50 (1983) Where defendant was convicted of the murder of two police officers, the trial court erred by admitting threatening statement allegedly made by defendant about six years earlier. A general threat not specifically directed towards any person has little probative value, but very likely to arouse prejudice or hostility. See also, **People v. Robinson**, 189 Ill.App.3d 323, 545 N.E.2d 268 (1st Dist. 1989) (a threat by the accused to kill or injure a person other than the deceased is prejudicial, irrelevant and inadmissible).

People v. Butler, 58 Ill.2d 45, 317 N.E.2d 35 (1974) Evidence that defendant cohabited with a woman who was not his wife was irrelevant.

People v. Raby, 40 Ill.2d 392, 240 N.E.2d 595 (1968) Proffered testimony which was cumulative on an issue that was not in dispute was immaterial and properly excluded. See also, People v. Molstad, 101 Ill.2d 128, 461 N.E.2d 398 (1984) (evidence is cumulative when it "adds nothing to what is already before the jury").

Illinois Appellate Court

People v. O'Daniell, 2024 IL App (5th) 230084 The appellate court reversed the trial court's order barring the State from presenting defendant's video-recorded police interview as evidence at defendant's trial for first degree murder arising from the death of his infant son. The court first found that it had jurisdiction over the State's appeal under Supreme Court Rule 604(a)(1) because the trial court's order barring introduction of the video had the substantive effect of suppressing evidence. While the court's order did not bar the State from presenting testimony about the police interview, any such testimony simply would not have been the same as introducing the recording itself. An individual's demeanor when making a statement is important when determining what weight to give that statement. The video-recording here was the most accurate and reliable evidence of the interview. It occurred shortly after the alleged offense, and it captured defendant's words and demeanor in response to the police questions about the incident.

On the merits, the court found that the trial court abused its discretion in barring the video recording from evidence. The video was not other bad acts evidence. While it showed that defendant became angry at times during questioning, it was directly relevant to the question of whether defendant committed the charged offense because it contained defendant's statements shortly after his child was taken to the hospital. Further, even if the recording did contain evidence of other bad acts, it was plainly relevant to the issue of intent as it contained defendant's explanations of what happened during the time he was alone with the child.

And, the probative value of the evidence was not outweighed by its prejudicial effect. The video recording was the strongest evidence of defendant's statements and demeanor shortly after the alleged offense, and it was undoubtedly relevant to whether he committed the charged acts. Although defendant's demeanor during portions of the interview cast him in a negative light, the recording was not unduly prejudicial. Defendant's explanations of what occurred were inconsistent with law enforcement's findings, making his statements of significant probative value to the trier of fact. And, where defendant knew he was being recorded and was properly *Mirandized* before making any statements, he could not now complain that the recording captured his shouting and yelling during the interview.

People v. Woodson, 2023 IL App (1st) 191353 The trial court abused its discretion in admitting extensive unrelated and prejudicial gang evidence at defendant's trial. While gang evidence was admissible to establish defendant's motive for the shooting here, it should have been enough to allow evidence that defendant had been the victim of a gang shooting months earlier, defendant learned that his cousin had been stabbed just before the shooting at issue here, and as defendant approached the group at which he shot, he demanded to know "which one of you...," presumably wanting to know which one had stabbed his cousin. The introduction of detailed evidence of numerous other gang-related crimes and events "was far more prejudicial than probative and simply not necessary."

But, the error did not require reversal. The evidence showed that defendant was not personally involved in any of the other gang-related conduct that was admitted, and thus its prejudicial impact was lessened. Further, defendant was identified as the offender by three separate eyewitnesses, two of whom knew him. And those identifications were corroborated by testimony from defendant's own family and friends that he had disappeared from home for a short time around the time of the shooting and it was less than a block from defendant's house to the scene of the shooting.

People v. Hudson, 2023 IL App (1st) 192519 Police had a search warrant for defendant's residence. They were looking for a man named Tommie Williams, who was suspected of manufacturing and distributing cannabis, and who was known to stay at the home. At the home, however, the police did not find Williams or cannabis. Instead, they found a gun in a bedroom closet. Defendant was present at the time and was charged with armed habitual criminal.

At trial, the court denied defendant's request to allow testimony about the contents of the search warrant, specifically that the target was Williams, not defendant, and that the suspected offense involved cannabis, not a weapon. Evidence at trial was that the police discovered the gun in a bedroom closet, a man's clothing was in that bedroom, mail addressed to defendant was found in the bedroom, and defendant had medication on the dresser in the bedroom. Additionally, an officer testified that defendant admitted that the gun was his. Defendant denied making that statement and presented evidence that he actually lived in the basement of the home, including testimony of other residents, as well as his ID card and voter registration.

During jury deliberations, the jurors sent out a note asking what the warrant was for. The court refused counsel's request to inform the jury of the target and contents of the warrant and instead responded that the police had a "lawful warrant" and "what the warrant was for is not in evidence and should not be considered." The jury found defendant guilty.

The trial court abused its discretion when it applied the hearsay doctrine to exclude the contents of the search warrant. Defendant was not seeking to admit the specifics of the warrant for the truth of the matter asserted therein, but rather to show the course of the

investigation. The contents should have been admitted here to prevent the jury from drawing improper inferences about the reason for the search of defendant's home. Given the relatively thin evidence of defendant's knowing possession of the gun, coupled with the jury's specific question about the contents of the warrant, the appellate court concluded that defendant was prejudiced by the court's refusal to admit the warrant's contents. The matter was reversed and remanded.

The dissenting justice would have affirmed on the basis that the existence of the warrant was admissible to show that the police had the authority to enter the home, but the contents of the warrant were not relevant to any fact at issue and thus were not admissible.

People v. Williams, 2022 IL App (2d) 200455 The trial court did not err in admitting a video recording of defendant at the police station, prior to his interrogation, where the video showed defendant cursing and acting belligerently. The video was relevant because it contained statements by defendant that were inconsistent with statements he made during his interrogation. Defendant denied committing the murder of his roommate. On the preinterrogation video, defendant said he did not know what happened, that he returned home from a party and nearly tripped over the victim, and that some unidentified individual had killed his roommate. During the formal interrogation, defendant initially denied knowing anything about the murder, but then claimed someone named "Rick" had committed the crime. Defendant also claimed that he was present when Rick and the roommate had a physical altercation, and that he saw Rick strike the victim with a piece of wood. Thus, despite the colorful language used by defendant on the preinterrogation video, it was relevant to assist the jury in assessing his credibility and was not improper propensity evidence. Further, defendant failed to properly preserve this issue, and even if admission of the video was error, it was not plain error under either prong.

People v. Stowe, 2022 IL App (2d) 210296 Defendant was working as a caregiver at a facility for physically and mentally disabled individuals when he was charged with criminal sexual abuse and aggravated criminal sexual abuse. The charges arose out of an incident where defendant was supervising a 14-year-old autistic boy who had wet himself. Defendant took the boy to a bathroom to clean up, and a supervisor entered and believed she saw defendant touching the boy's penis. Defendant denied that contact.

At trial, over defendant's objection, the State introduced two photos of nude adult men recovered from defendant's cell phone. Defendant argued that the evidence was irrelevant, while the State asserted that the photos were relevant to prove defendant's intent to commit the charged offense. The appellate court agreed with defendant.

Evidence is relevant if it has any tendency to make the existence of a fact at issue more or less probable than it would be without the evidence. The State asserted that the photos were relevant because they showed defendant's attraction to men, and thus showed a propensity to sexually abuse a male child. The court rejected that assertion, holding that while the photos were, at best, probative of sexual attraction to adult men, there was no evidence to support the further inference that sexual attraction to adult men is probative of sexual attraction to children of any kind. And, the erroneous admission of the photos was not harmless. The evidence against defendant was not overwhelming, but rather came down to a credibility contest between defendant and his supervisor, the sole eyewitness. Thus, the matter was reversed and remanded.

People v. Phillips, 2022 IL App (1st) 181733 Evidence at defendant's felony murder trial, concerning the inability to charge defendant with other crimes due to the statute of limitations, was unduly prejudicial.

Defendant was charged with two counts of felony murder, one count predicated on aggravated criminal sexual assault and the other on burglary. During the direct examination of an investigating officer, the prosecutor elicited testimony that, by the time of defendant's arrest, the statute of limitations had expired for the offenses of burglary and aggravated criminal sexual assault.

Defendant argued that the statute of limitations testimony was improper because its "only conceivable purpose was to imply to the jury that defendant would escape responsibility" for aggravated criminal sexual assault and burglary unless defendant was convicted of murder. The State maintained that such testimony was properly admitted to explain the course of the police investigation and the charges that defendant faced.

The Appellate Court agreed with defendant. The testimony regarding the expiration of the statute of limitations for the uncharged offenses was irrelevant to the felony murder prosecution. Whether or not the limitations period expired did not bear on the police investigation. This error was not harmless because the evidence created a risk of a verdict based on improper evidence in a close case. The testimony signaled to the jury that the State could never prosecute defendant for aggravated criminal sexual assault or burglary and, thus, the only way that defendant could be held accountable for his acts against was to convict him of first degree murder. In a case where the causation element of the murder charge was close, the jury may have been tempted to find defendant guilty despite having reasonable doubt, in order to ensure he did not escape accountability for the predicate offenses.

People v. Davila, 2022 IL App (1st) 190882 The trial court erred when it denied the defense request to redact certain prejudicial statements, made by detectives, from defendant's videotaped interrogation.

Defendant had been arrested for murder and attempt murder based solely on the eyewitness identification of the attempted murder victim. Defendant consistently denied his involvement throughout the 2 hour and 42 minute video, and gave an alibi that he would eventually assert at trial. The State introduced the full video.

Defendant objected to two sets of statements by the detectives heard on the video. In the first, the detectives repeatedly vouched for the credibility of the eyewitness. The detectives told defendant that the eyewitness knew him since he was a child and had no gang affiliations, making it unlikely he would make a false accusation. They stated that the eyewitness had a good memory and provided accurate descriptions.

In the second set of statements, the detectives tried to convince defendant of the strength of the evidence against him. They told him he wouldn't have been arrested if their case was weak. They asserted that other witnesses had identified him, and "other stuff" implicated him in the offense. They insinuated several other witnesses identified defendant as the shooter, but the detectives couldn't tell him who they were because they didn't want to put their lives in danger. (No other eyewitnesses testified at trial.)

The Appellate Court found prejudicial error. Although police statements during an interrogation are generally admissible to show the course of investigation and to provide context for defendant's statements, the general evidence standards still apply: the evidence must be relevant and its prejudicial effect cannot substantially outweigh its probative value. Here, the statements were more prejudicial than probative. The first set of statements improperly bolstered the sole eyewitness's credibility, while the second suggested the existence of additional evidence against defendant, including witnesses whom the detectives

believed defendant would harm if identified. The statements therefore insinuated that there was more evidence against defendant and the detective himself believed defendant to be a killer. Notably, because the defendant never confessed, the State didn't need the detectives' statements to explain a change in defendant's responses. The statements thus had no material value.

The State could not show that these preserved errors were harmless. The State presented a single eyewitness and no physical evidence or confession. Even though the witness knew defendant, in a similar case, **People v. Lerma**, 2016 IL 118496, the Supreme Court found the evidence was not overwhelming. Defendant here also provided an alibi that was partially corroborated by a witness and cell phone records. The court remanded for a new trial.

People v. Taylor, 2022 IL App (5th) 180192 Defendant alleged ineffective assistance of counsel where, in his trial for armed habitual criminal, counsel did not offer to stipulate to defendant's felon status, as required by **People v. Moore**, 2020 IL 124538. The State argued that, unlike **Moore**, which involved a charge that required only proof of any prior felony conviction, the armed habitual criminal statute requires the State to prove defendant had two or more prior convictions of the specific type enumerated as qualifying offenses in the statute. Thus, the type of conviction had probative value.

The Appellate Court agreed with defendant, because even under the more exacting requirements of the armed habitual criminal statute, the parties could stipulate that defendant had two prior felony convictions which met the qualifications of the statute, without divulging the type of convictions. If defendant is willing to stipulate that his prior convictions satisfy the armed habitual criminal statute, the admission of those felonies into evidence would serve no evidentiary purpose other than to expose defendant to the risk of unfair prejudice.

Here, counsel performed unreasonably where he never objected when the prior convictions were detailed in the charging instrument, opening statements, closing argument, jury instructions, and the certified copies of conviction, which were entered into evidence. These repeated references, along with the prejudicial nature of the prior offenses – aggravated battery resulting in great bodily harm and unlawful delivery of a controlled substance – and the circumstantial nature of the State's case, rendered counsel's performance prejudicial.

People v. Jenkins, 2021 IL App (1st) 200458 On direct, an officer who testified to seeing defendant holding a gun testified that she did not wear a body-cam, was never given a body-cam to wear, and that as a member of the U.S. Marshals Fugitive Task Force, she was "exempt" from the body-cam law. The defense was barred from cross-examining the witness on the body-cam requirements and its exemptions. And the trial court refused non-pattern jury instructions tendered by the defense, which sought to inform the jury that the witness was in fact required to wear a body-cam.

The Appellate Court found no error. The details of the body-cam law were improper subjects for cross-examination of a fact witness. The defense should have called its own witness to establish department policy on body-cams. Although the witness mentioned she was "exempt," she apparently made that assumption from the fact that neither she nor other task force members were issued body-cams. Either way, the line of questioning was not relevant. Even if she was incorrect about being "exempt," this mistake would not affect her credibility where it was presumably her department who had made such a determination.

Nor did the trial court abuse its discretion in refusing to instruct the jury as to 50 ILCS 706/10-30, which states that if a recording was intentionally not captured, the jury shall consider that fact in weighing the evidence, unless the State provides a reasonable justification. The Appellate Court took judicial notice of a Chicago Police Department directive establishing that body-cams are required only for "Bureau of Patrol" officers and that other unspecified members are exempt from the body-cam law. Defendant failed to establish that the task force witness was not exempt, and therefore there was no basis for the instruction.

People v. Brakes, 2021 IL App (1st) 181737 Photograph of defendant holding a gun, along with a co-defendant flashing a gang sign, was irrelevant and therefore erroneously introduced at defendant's trial on charges of armed robbery, attempt armed robbery, and murder. The photo was taken two months before the charged offenses, and the State provided no link between the photograph and the offenses. Defendant's possession of a gun in the photograph did not corroborate the identification of him as the gunman. His prior gun possession says little about whether he would use a gun to commit a robbery or murder.

But, the error in admitting the photograph was harmless. A single witness identified the photograph and provided the foundation for its admission. The State never mentioned the photograph again, either through other witnesses or in closing arguments. Although the evidence against defendant was not overwhelming, the photograph did not contribute to defendant's conviction where it was a minor part of the State's case.

People v. Sheppard, 2021 IL App (1st) 181613 The trial court erred in admitting a recorded jail phone call where defendant discussed his plans to hire private counsel and repeatedly disparaged the complaining witness in his domestic battery case. Nothing that was said during that call made any fact at issue in his case more or less probable, so it lacked relevance. The error was harmless, however, where similar information was discussed during several other recorded calls which were admitted without challenge.

People v. Alexander, 2020 IL App (3d) 170829 The Appellate Court remanded for appointment of new counsel and the filing of new post-trial motions, where defendant's *pro se* post-trial claim of ineffectiveness showed possible neglect.

Prior to trial, the State had moved to bar the testimony of two witnesses who would testify that a third party, Ricky, admitted to committing the aggravated battery for which defendant was on trial. The court granted the State's motion, finding the testimony was hearsay. After his conviction, defendant filed a *pro se* post-trial motion alleging trial counsel's ineffectiveness for failing to seek admission of a recorded phone call in which Ricky admitted to the offense. Asked by the court if counsel was aware of this recording, counsel stated he was, but that he heard about it "late" and didn't want to ask for a continuance. The Appellate Court found potential neglect of the case and remanded for a hearing on whether counsel was ineffective for failing to move to admit the recording. Although not necessarily admissible, it could at least support an argument that the third-party admission was sufficiently reliable for use at trial, and therefore the defendant met the "potential neglect" standard.

The Appellate Court found further possible neglect in the counsel's failure to object to a video of the victim in the hospital. The video was introduced to show the victim's identification of defendant in a photo array presented by a detective. This identification had already been introduced through the testimony of both the victim and the detective, so it had little probative value. In the course of the video, a doctor entered and could be heard explaining to defendant the need for a catheter as a result of his having been shot in the penis, and that immediate action was required to avoid insertion of a metal rod to save his

urethra. Defendant's post-trial motion showed defense counsel potentially neglected his case by failing object to the video as substantially more prejudicial than probative under Rule 403.

People v. McBride, 2020 IL App (2d) 170873 Defendant was convicted of three weapons offenses. The State sought to prove defendant's control over the bedroom in which the guns were found by introducing various personal affects of defendant found in the room. Along with various items linking defendant to the room, the State also introduced $184 in a "bank pouch" and $1907 found in various pockets of men's jeans.

The Appellate Court held that the introduction of a large amount of cash was irrelevant to the question of constructive possession. The cash had no bearing on whether or not defendant exercised control over the items in the room. And it was prejudicial given that the jury heard about defendant's prior drug conviction and large sums of cash could imply that defendant was a drug dealer.

Despite the prejudicial effect, the error was harmless. The court refused to apply the "harmless beyond a reasonable doubt" standard applicable to constitutional errors. The court acknowledged that this standard applies when there is an "other crimes" error, but unlike an other crimes error, the instant evidentiary error was not an explicit accusation of criminality. Defendant even proffered an innocent explanation for the cash. Applying the harmless error standard applicable to evidentiary errors, no reasonable juror would have acquitted given the remaining evidence of possession.

People v. McCallum, 2019 IL App (5th) 160279 Trial judge did not abuse his discretion in denying defendant's motion to bar admission of a redacted recording of his second police interview. Statements of investigators during questioning are generally admissible to demonstrate defendant's responses or the effect of the investigator's statements on defendant. Here, admission of the second interview was necessary to place the first interview in context. While defendant did not make an admission during the interview, his responses were relevant in that he did change his story during the second interview, and he showed a lack of remorse about the deaths of his friends. Further, the interview was not an integral part of the State's case against defendant, and defense counsel actually used the interview to show that defendant had consistently maintained his innocence. In reaching this conclusion, the court distinguished **People v. Hardimon**, 2017 IL App (3d) 120772, where the majority of the recorded interview that was admitted at trial contained irrelevant and highly prejudicial comments, the police were overly aggressive, and defendant had not changed his version of events in response to ongoing questioning.

People v. Martinez, 2019 IL App (2d) 170793 Before her trial for battery, defendant moved to admit the complainant's 55-year-old conviction for aggravated battery under **Lynch**. The trial court found the conviction too remote in time, and held it was more prejudicial than probative under Rule 403. On appeal, defendant argued that the court erred in applying Rule 403 to **Lynch** evidence. The Appellate Court disagreed, finding the Rule 403 balancing test is applicable to all relevant evidence, and nothing in **Lynch** or its progeny precludes a trial court from considering prejudice to the State.

People v. King, 2018 IL App (2d) 151112 The trial court erred when it allowed the State to call an expert in "crime scene analysis." The decedent, defendant's wife, was found on train tracks in running clothes. The parties' competing medical experts disagreed over whether she was strangled or died of natural causes. The State's crime-scene-analysis expert opined

that she was likely killed by a close acquaintance in her home and transported to the staged scene, based on body positioning, location of lividity, absence of sports bra or earbuds, and vegetation found in decedent's home and on her body, among other things.

The Appellate Court held that testimony concerning cause of death exceeded the scope of the witness' expertise. Because the cause of death was contested and a lay person would not be able to discern the cause of death without a medical expert, it was improper for a crime scene expert to weigh in without the requisite medical expertise. Several aspects of his testimony also deviated from his specialty, including the effects of lividity, and the type of vegetation found on her body and in her home. Other testimony, including what a runner would typically wear, were not proper subjects of expert testimony because they were based on logical conclusions that jurors could draw for themselves. Finally, in testifying that the offender must have been a close acquaintance, the expert improperly engaged in profiling and indirectly accused defendant. The errors were not harmless in a close case without eyewitnesses or a confession, and required a new trial.

The court also erred in overruling objections to testimony from the decedent's family concerning how upset they were by news of her death. Some references to a victim's family is inevitable, but dwelling on their grief is unduly prejudicial.

People v. Haiman, 2018 IL App (2d) 151242 A defendant has the right to the meaningful opportunity to present a defense, but evidence of a purported defense can be excluded if its probative value is outweighed by its prejudicial impact, if the evidence would lead to confusion of the issues, or if the evidence has the potential to mislead the jury. Where defendant was charged with unlawful possession of a controlled substance, the court did not abuse its discretion in prohibiting defendant from testifying that she had a prescription for the pills in question. Defendant disclosed the proposed defense to the State but did not provide a copy of a prescription and said she would not name the prescribing doctor or date of prescription.

It is defendant's burden, pursuant to 720 ILCS 570/506, to establish her right to possession of the substance pursuant to a lawful prescription under 720 ILCS 570/302(c)(3). Defendant's proposed self-serving testimony would have verged on a conclusion of ultimate fact and would have rendered the burden of proof meaningless. Her testimony also would have been legally insufficient because the pills were not in their original container and the statutory defense requires proof that the prescription was issued by a "practitioner" which could not be established on defendant's non-specific testimony.

People v. Johnson, 2018 IL App (1st) 140725 The trial court did not abuse its discretion nor infringe on defendant's right to present a defense when it barred expert testimony from a doctor, and lay testimony from defendant's family, that would show that defendant was in a confused state following an epileptic seizure at the time of the shooting. The defense made clear that it was not raising an insanity defense, but rather wanted to show the absence of a voluntary act. The Appellate Court agreed with the State's argument that the testimony gave rise to a diminished capacity defense, which is not allowed in Illinois. Unlike other cases finding involuntary acts are not criminal, the testimony here could not establish whether the acts after a seizure are voluntary or involuntary. Thus, the testimony was irrelevant, would not aid the jury and would confuse the issues.

People v. Irwin, 2017 IL App (1st) 150054 Defendant was convicted of aggravated unlawful use of a weapon based on his failure to have a valid FOID card. At trial, the State introduced

and sent to the jury two photographs of defendant taken on the night he was arrested. Both photographs depict defendant with long hair and casual clothing.

The court held that the photos were irrelevant to any issue before the jury. The only apparent purpose for admitting the photos was to show the jury that on the night he was arrested defendant was not as neatly attired or groomed as he was at trial. But these facts about defendant's appearance did not make it any more or less likely that he possessed the weapon that was found where he was sitting. The trial court thus abused its discretion in admitting the photos.

The Appellate Court however, with one justice dissenting, found that the error was harmless and affirmed defendant's conviction.

People v. Hardimon, 2017 IL App (3d) 120772 An officer's statements to a defendant during an interrogation are generally admissible if they are necessary to demonstrate the effect of the statements on defendant or to explain a defendant's response. But an officer's opinion regarding the ultimate question of fact can be significantly prejudicial since police are recognized authority figures.

At defendant's trial, the State introduced a video recording of defendant's interrogation. During the first third of the interrogation, the police questioned defendant about his whereabouts and knowledge of the shooting. Then the interrogation shifted from a conversational tone to accusations that defendant committed the shooting. During the remainder of the recording, defendant adamantly denied the officers' accusations. At several points, the officers claimed that the evidence was so heavily weighed against defendant that he would be easily convicted at trial and face a lengthy prison sentence. The officers insisted that they were not lying because they had a reputation to protect.

The court held that trial counsel's failure to ask that the latter two-thirds of the video be redacted constituted ineffective assistance of counsel. That portion of the video served only to impermissibly bolster the State's case and inflame the passions of the jury. Since defendant adamantly denied any involvement in the shooting, the final two-thirds had no probative value. It only served to improperly allow the officers to conclusively state that defendant was guilty. And since the remainder of the evidence was circumstantial and failed to directly connect defendant to the crime, the improper video evidence was highly prejudicial.

The court reversed defendant's convictions and remanded for a new trial.

People v. Smith, 2017 IL App (1st) 143728 On appeal from his murder and attempt murder convictions, defendant argued that several errors cumulatively denied him a fair trial, including two instances of prosecutorial misconduct and two evidentiary errors. Some of the errors had been preserved, others forfeited. The Appellate Court, citing **People v. Blue**, 189 Ill. 2d 99 (2000), agreed to consider the errors cumulatively and, to ensure that defendant received a fair trial, decided not to apply the forfeiture rule, which it deemed a limitation on the parties, not the court.

The State alleged defendant killed his friend Fias, and attempted to kill Fias' baby daughter, in an inexplicable knife attack. He raised an insanity defense, but was convicted of first-degree and attempted murder. On appeal, he challenged, *inter alia*, the highly emotional, tear-filled testimony of a neighbor who came to the aid of the stabbed decedent and called 911. The neighbor's testimony even caused some jurors to cry. Defendant alleged the testimony lacked probative value and therefore should have been excluded as prejudicial. The Appellate Court agreed. Although counsel did not object, and the trial court has no duty to *sua sponte* bar testimony, a trial court is responsible for ensuring that exceedingly emotional testimony does not distract the jury from the issue at hand. Here, the court should

have taken corrective action, such as ordering a recess, and its failure to do anything constituted an abuse of discretion.

Similarly, the trial court erred in overruling the defense objection to the neighbor's 911 call. Assuming the 911 call had some relevance to the State's case, defendant did not dispute the cause of death, and the neighbor testified at trial to the relevant information from the call. The remainder of the call mostly involved hysterical crying and unintelligible screaming such that its admission primarily served to inflame the passions of the jury.

These evidentiary errors, in conjunction with prosecutorial misconduct committed during opening statements, combined to deprive defendant of a fair trial. By injecting unnecessary emotion into defendant's trial, "there was a real risk that these errors, regardless of the strength or weakness of the State's case, compelled the jury into rendering verdicts grounded in compassion rather than a dispassionate evaluation of the facts and the decisive issue of defendant's sanity."

People v. Kent, 2017 IL App (2d) 140917 As a matter of first impression in Illinois, the Appellate Court held that in order to authenticate a Facebook post for admission in a criminal trial, the proponent must produce evidence that is sufficient to allow a reasonable juror to find that the evidence is in fact what it is claimed to be. Evidence of authentication may be direct or circumstantial, but the most common form is the testimony of a witness with knowledge of the nature of the evidence. In addition, some evidence can be authenticated by the combination of all the relevant circumstances and the distinctive characteristics of the item such as appearance, contents, substance, or internal patterns.

Defendant was charged with a murder in which the decedent was killed in his driveway. A police officer testified that on the day after the offense, he used a fake profile to search Facebook. He testified that he found a profile under a name and nickname that were similar to defendant's along with a photograph which resembled defendant and an undated posting which stated that "its my way or the highway . . . leave em dead n his driveway." The officer did not know when the post had been created, but he testified that it was deleted later the same day.

The court concluded that there was no evidence to justify a reasonable conclusion that defendant created the post or was responsible for it. Thus, the foundation was insufficient to justify use of the Facebook post as an admission by defendant. Defendant did not admit to creating the Facebook profile or making the post, and was not observed composing the communication. The State presented no Facebook records to indicate that the IP address used to create the profile or the post was in any way associated with defendant, and failed to even connect defendant to the last name used in the profile.

The court acknowledged that there was some circumstantial evidence of authentication in defendant's nickname, the fact that the decedent was killed in his driveway, and the photograph allegedly resembling defendant, but noted that the record failed to show that such matters were not public knowledge which could have been used to create the profile without defendant's awareness. The court stressed the ease of creating false Facebook pages and the fact that no verification of identify is required to create a Facebook profile. Even the detective's testimony that the post had been "deleted" is questionable, as the person who created the post could have changed the privacy settings in a way that merely denied public access to it.

The court stated, "At best, the photograph and the name on the Facebook profile are *about* defendant and not evidence that defendant himself had created the post or was responsible for its contents. . . . The ease in fabricating a social media account to corroborate

a story means that more than a 'simple name and photograph' are required to sufficiently link the communication to the purported author."

Because the trial court improperly admitted the Facebook post, and because the State argued the existence of the post as an admission by defendant that he had committed the murder, reversible error occurred. The conviction was reversed and the cause remanded for a new trial.

People v. Pike, 2016 IL App (1st) 122626 The State's expert compared a DNA profile found on a firearm connected to the offense with defendant's DNA profile and concluded that he could not be excluded as a contributor. But the expert's statistical analysis showed that approximately 50% of unrelated individuals also could not be excluded as contributors to the DNA profile found on the firearm. In other words, one out of every two randomly selected individuals could not be excluded. Defendant did not object to this testimony.

The Appellate Court held that the expert's testimony was irrelevant and should not have been admitted. Since the statistical evidence showed that 50% of the population could not be excluded as potential contributors, that probability did not make defendant's identification any more or less probable. It was thus irrelevant.

But the court further held that the admission of this testimony was not plain error. The evidence was not closely balanced and the error was not serious error and thus neither prong of the plain error doctrine was satisfied. Defendant's conviction was affirmed.

The dissent believed the evidence was closely balanced and thus would have reversed defendant's conviction.

People v. Starks, 2014 IL App (1st) 121169 At defendant's trial for first degree murder, a police officer testified that while she and other officers were investigating an unrelated case at an apartment building, they observed defendant exit the back of the building and run through an alley while wearing a t-shirt and no shoes. When the officer stopped defendant and learned his name, she realized that he was the subject of an investigative alert.

A second officer testified that as part of the unrelated investigation, he entered an apartment where the door was ajar. He observed three handguns on the kitchen counter. One of the handguns was subsequently determined to have been the weapon used in the shooting with which defendant was charged.

DNA analysis revealed that the weapon used in the shooting contained the mixed DNA profiles of at least three people and that defendant could not be excluded as the primary contributor of the DNA. The shooting had occurred two months before the weapon was seized from the apartment.

The trial judge erred by admitting evidence of weapons that were found in the apartment but which were not shown to have any connection to the offense. A weapon found in the defendant's possession is generally inadmissible unless it has some connection to the crime charged. For a weapon to be admitted, there must be evidence to connect it to both the defendant and the crime. Evidence that the weapon is suitable for commission of the crime satisfies the second element.

Here, it was error to admit the weapons because there was no evidence to connect them to the defendant. Not only was there no evidence to show that defendant possessed the weapons, there was no evidence to connect him to the apartment where the weapons were found. Defendant was stopped because, while police were investigating an unrelated offense, they saw him running barefoot through the alley. He was not seen leaving the apartment where the weapons were found, and there was no evidence to connect him to either the

apartment or the two weapons that were not suitable for committing the offense. Under these circumstances, those weapons were irrelevant and should not have been admitted.

Because the evidence was closely balanced, admission of the weapons constituted error under the first prong of the plain-error doctrine.

People v. Lopez, 2014 IL App (1st) 102938-B The trial court abused its discretion by admitting evidence that three weeks before the murder with which defendant was charged, some of the co-defendants in the charged offense beat a man and vandalized property in the same parking lot where the charged crime occurred. The court noted that the only evidence tying the prior incident to the charged crime was that three of the co-defendants in the charged crime participated in the earlier crime. There was no evidence that defendant knew about the earlier incident or that the charged crime was in any way motivated by the earlier event.

The court stressed that the key issue in the charged offense was whether the State proved beyond a reasonable doubt that defendant was one of the perpetrators in the beating death of the decedent. Evidence about an unrelated incident several weeks earlier had no probative value on that issue, at least in the absence of evidence indicating that there was some link between the offenses.

Defendant's conviction for murder was reversed and the cause remanded for a new trial.

People v. Roman, 2013 IL App (1st) 110882 Evidence that defendant was a gang member or involved in gang-related activities is admissible to show a common purpose or design, or to provide a motive for an otherwise inexplicable act. However, due to the possibility of strong prejudice against street gangs, gang-related evidence is admissible only if there is adequate proof that membership or activity in the gang is related to the crime charged. The trial court must take great care in admitting gang-related testimony.

The trial court erred at a trial for first degree murder by admitting testimony from eyewitnesses that defendant was a member of the Latin Kings. The Court rejected the State's argument that such evidence strengthened eyewitness identifications of the defendant as one of the perpetrators. Although two of the eyewitnesses stated that they knew defendant was a gang member, none of the eyewitnesses based their identifications of defendant on that fact. Instead, the witnesses stated that they recognized the perpetrators of the offense because they had seen them in the neighborhood for several years. Thus, gang membership was not related to the identifications.

Similarly, the trial court improperly admitted photographs of defendant's tattoos and testimony from a police officer that the tattoos showed that defendant was a member of the Latin Kings. Although the judge also admitted this evidence to corroborate eyewitnesses' identifications, none of the witnesses mentioned the tattoos or suggested that the tattoos were an aid in identifying defendant as one of the perpetrators. Thus, the evidence was not relevant to the identifications and had the effect of inflaming the jury.

Furthermore, the gang evidence was not admissible to support the State's theory that the murder was gang related. The State argued that the perpetrators killed the victim to avenge a perceived slight to the Latin Kings a few weeks earlier, when workers at the factory where the offense occurred gave shelter to a man who was being beaten. The court stressed that the State failed to present any evidence to show that the instant offense was intended as retaliation for a perceived slight. In addition, there was no evidence that either this incident or the prior one was gang related, as there was no testimony that the perpetrators

flashed gang signs, yelled gang slogans, or otherwise indicated that they were members of a gang.

Finally, the trial judge erred by denying defense counsel's request to remove a "Gang Unit" sticker from the State's courtroom cart, especially since the State had no objection. Given the strong risk of prejudice that is inherent whenever a jury is exposed to gang-related evidence, the presence of the sticker on the cart had the potential to negatively impact the defense. The court stated, "Whether the case involves gang affiliation or not, fairness dictates that the cart be identified with a sticker that does not transmit a potentially prejudicial message, especially when an innocuous alternative is so easy."

People v. Barnes, 2013 IL App (1st) 112873 Defendant was charged with heinous battery and aggravated battery of a child after a four-year-old child in his care suffered severe burns when he was exposed to hot water. The court concluded that the trial court abused its discretion by allowing the assistant State's Attorney to use the child as an exhibit by pulling down his pants, picking him up, and showing the jury the scars on his side and legs.

Although permanent disfigurement is an element of heinous battery, using the child as an exhibit was cumulative where the State had already established permanent disfigurement through photographs and expert testimony. The court also found that due to the risk of inflaming the jury's passions, the prejudicial effect of using the child as an exhibit outweighed any probative value.

The trial court also erred by admitting evidence that the four-year-old victim suffered a liver contusion at some point. Defendant was charged with injuring the child by exposing him to hot water. The State's expert testified that the child's blood work indicated that he had suffered a liver contusion at some point within the 24 to 36-hour-period before he was examined at the emergency room. The State's expert also admitted that the liver contusion may have had an explanation other than child abuse and that there were no signs of bruising on the child's abdomen. Defendant did not have sole custody of the child in the 24 to 36-hour-period preceding the examination.

In finding an abuse of discretion, the court concluded that the probative value of the evidence was tenuous and that there was only mere suspicion that defendant was responsible for the injury. In addition, the evidence was highly prejudicial because the jury would be more likely to convict the defendant of the charged crimes if it believed that he was also responsible for a separate injury.

The court concluded that the combination of errors caused manifest prejudice to the defense.

People v. Santiago, 409 Ill.App.3d 927, 949 N.E.2d 290 (1st Dist. 2011) Just as evidence of a co-defendant's confession is inadmissible as evidence of defendant's guilt, evidence that a co-defendant pleaded guilty or was convicted is inadmissible as evidence of defendant's guilt. This rule was not violated where the prosecutor elicited from the co-defendants that they had pleaded guilty, but in the context of admitting statements that they had made at their plea hearings acknowledging the accuracy of their post-arrest statements. The post-arrest and guilty-plea statements inculpating defendant were admitted as substantive evidence pursuant to 725 ILCS 5/115-10.1 as they were inconsistent with the co-defendants' testimony at trial. The State never argued to the jury or even suggested that the co-defendants' guilt was evidence of defendant's guilt.

Nor was it error to elicit evidence of the sentences that the co-defendants received. The jury was not informed of the sentences for the improper purpose of suggesting that

defendant faced a comparable sentence if convicted, but to emphasize the doubtful explanation offered by the co-defendants for their decision to plead guilty.

It was also not error for the prosecutor to elicit evidence that defendant was not present when the co-defendant pleaded guilty. This evidence was offered to provide a plausible explanation for the co-defendant's contrary testimony at trial, i.e., that defendant's absence at the plea hearing made it easier for the co-defendant to testify to defendant's guilt, and defendant's presence at trial made it difficult for the co-defendant to repeat that testimony.

Justice Robert E. Gordon specially concurred. It was error, although harmless, to elicit evidence of co-defendants' guilty pleas, where it was not necessary to elicit that evidence in order to introduce the prior inconsistent statements they made at the plea hearing.

People v. Limon, 405 Ill.App.3d 770, 940 N.E.2d 737 (2d Dist. 2010) At defendant's trial for robbery and aggravated battery, the State introduced evidence that 11 days following the offense in which complainant was robbed by two men, the police saw defendant, causing him to run and drop a gun. Defendant clenched his hands at his chest when the police attempted to handcuff him, causing the police to hit defendant in the face and rib cage with fists to effect his arrest. The court instructed the jury to consider that evidence for the limited purpose of explaining the circumstances of the arrest.

The Appellate Court concluded that the court abused its discretion in admitting evidence of defendant's possession of the handgun. The probative value of evidence that defendant possessed a gun 11 days after the offense did not outweigh the prejudicial effect of this evidence where the charged offense did not involve any element of possession or use of a weapon.

Presentation of irrelevant, prejudicial evidence of the gun was not justified based on the hypothetical possibility that defendant would claim that he was coerced into making incriminating statements by police brutality. Evidence of the gun was not necessary to rebut a theory of coercion because defendant's refusal to put his hands behind his back was sufficient to explain the officers' use of force in effecting the arrest. Although defendant had not informed the court that he would not pursue a theory of coercion and police brutality, a defendant is not required to forgo, in advance, a potential defense to preclude the State from introducing irrelevant, prejudicial evidence. Even if defendant had advanced a theory of coercion, evidence of the gun was not relevant.

People v. Decaluwe, 405 Ill.App.3d 256, 938 N.E.2d 181 (1st Dist. 2010) Defendant was charged with armed violence, aggravated kidnaping and attempt aggravated criminal sexual assault, in that he demanded that the 14-year-old complainant take nude photographs of him. Five-year-old photographs of the defendant's naked torso taken by defendant's wife and of defendant wearing shorts were not relevant and only invited speculation about the character of the defendant, especially given the nature of the charges.

People v. Hoerer, 375 Ill.App.3d 148, 872 N.E.2d 572 (2d Dist. 2007) At a trial for unlawful delivery of a controlled substance and involuntary manslaughter, the trial judge erred by allowing the State to elicit testimony that a co-defendant raped a witness on the night in question. The evidence prejudiced defendant because the testimony was graphic "and would tend to color a juror's view of defendant." Furthermore, the probative value of the evidence was diminished because there was no dispute concerning the witness's recollection of events after she had taken a drug - one of the reasons the trial court admitted the testimony. Finally,

to the extent the evidence had any relevance, it could have been easily replaced by less prejudicial testimony.

People v. Eghan, 344 Ill.App.3d 301, 799 N.E.2d 1026 (2d Dist. 2003) At a trial for unlawful possession of cocaine, the trial court erred by admitting evidence that defendant refused to take a drug test after his arrest. Such evidence was improper and unduly prejudicial because it allowed the jury to infer guilt from defendant's exercise of his rights. In addition, it had limited probative value.

People v. Roman, 323 Ill.App.3d 988, 753 N.E.2d 1074 (1st Dist. 2001) As a matter of plain error, the trial judge erred by admitting testimony that a police officer who had been involved in a shootout with the defendant subsequently received an award for "bravery above and beyond the call of duty" in connection with the incident. Such testimony was not only hearsay, but was irrelevant because it did not tend to prove that defendant committed the charges or disprove defense claims.

People v. Agee, 307 Ill.App.3d 902, 719 N.E.2d 251 (1st Dist. 1999) Testimony about narcotic trafficking was irrelevant to defendant's alleged commission of the offense of unlawful use of a weapon, and implied to the jury that defendant had engaged in uncharged narcotics offenses. The testimony was not relevant to provide the "necessary context" for the officer's presence in the area and to refute defendant's theory that he had been framed - "the State fails to explain how [the officer's] testimony regarding narcotics activity . . . refutes defendant's theory that the officers framed him for unlawful use of a weapon."

People v. Howard, 305 Ill.App.3d 300, 712 N.E.2d 380 (2d Dist. 1999) Where defendant was charged with the murder of his girlfriend's daughter, the trial judge erred by admitting evidence that defendant abused the girlfriend for nearly five years following the offense, including evidence about the frequency of beatings, specific incidents of abuse, and that defendant used drugs. Evidence is relevant only if it tends to make more or less probable the existence of any fact that is of consequence to the determination of the action; because defendant's abusive behavior following the victim's death did not tend to make more or less probable any fact of consequence, the evidence was irrelevant.

People v. Elliott, 308 Ill.App.3d 735, 721 N.E.2d 715 (2d Dist. 1999) At a trial for DUI, the trial court erred by admitting evidence that defendant was advised of the civil penalties stemming from a refusal to submit to a breath test. A motorist's knowledge of the potential consequences of a refusal to take a breath test is not circumstantial evidence of consciousness of guilt; any probative value of the civil penalties for refusing to submit to a breath test is outweighed by the prejudice.

People v. Maounis, 309 Ill.App.3d 155, 722 N.E.2d 749 (1st Dist. 1999) At an armed robbery trial, the trial judge erred by allowing the State to elicit testimony that defendant did not spend Christmas with his family. The fact that defendant was not with his family at Christmas was irrelevant to any issue in the case.

People v. Holloman, 304 Ill.App.3d 177, 709 N.E.2d 969 (4th Dist. 1999) Although defendant waived any error concerning the trial court's admission of expert testimony about "drug dealer profiles," "such evidence must be seriously scrutinized and handled with care." The court acknowledged that in some cases expert testimony about the manner in which

controlled substances are manufactured or packaged might be relevant, particularly if the issue is whether controlled substances were intended for personal use or for delivery. However, such evidence also presents a risk of extreme prejudice.

People v. Carter, 297 Ill.App.3d 1028, 697 N.E.2d 895 (1st Dist. 1998) In a prosecution for drug offenses, the State erred by introducing evidence that the arresting officers were familiar with defendant before he was arrested. By introducing evidence that an officer whose duties included "narcotics surveillance" and "gang surveillance" knew defendant before the arrest, the prosecution created the "obvious inference . . . that [defendant] had been engaged in prior illicit drug or gang activity." Because there were no issues concerning identification, there was no "relevant purpose for repeated references to a narcotics and gang surveillance officer knowing [defendant] by name."

People v. Ehlert, 274 Ill.App.3d 1026, 654 N.E.2d 705 (1st Dist. 1995) Where defendant was charged with murder for the death of her newborn child, evidence that defendant had undergone two earlier abortions should have been excluded as unduly prejudicial.

People v. Mason, 274 Ill.App.3d 715, 653 N.E.2d 1371 (1st Dist. 1995) The trial court committed reversible error by admitting irrelevant gang-related testimony. Where the State's theory of the case was that the decedent was the victim of intra-gang retaliation, evidence of rivalries between gangs, methods of presentment, graffiti, tattoos and drug sales were irrelevant. Although the State was allowed to prove defendant's gang affiliation to establish a motive, the remaining testimony did not show motive and was not admissible for any other purpose.

People v. Goldsberry, 259 Ill.App.3d 11, 630 N.E.2d 1113 (1st Dist. 1994) Evidence suggesting a gang affiliation is admissible to show motive or common design where there is evidence to suggest, to at least some slight degree, that the offense was gang-related. Although the State's expert testified that drawings and lyrics in defendant's notebooks were consistent with membership in a gang, there was no evidence from which it could be inferred that at the time of the shooting defendant was a gang member or that he was engaged in gang-related activity. To hold an offense gang-related merely because the defendant wrote about gangs in a notebook "stretches the rule beyond reason." See also, **People v. Collins**, 351 Ill.App.3d 175, 813 N.E.2d 285 (2d Dist. 2004)(prosecutor's "description of defendant as wearing beads and a blue bandana" appeared to be an attempt to imply that defendant was involved in a gang in a case in which gang membership was irrelevant); **People v. Iniguez**, 361 Ill.App.3d 807, 838 N.E.2d 65 (1st Dist. 2005) (trial judge abused his discretion by admitting extensive gang-related testimony, including testimony of a "gang specialist" who gave an "in-depth lesson on street gangs" in Chicago, where there was no evidence that defendant knew of a gang fight that occurred six months earlier and which was the "so-called" motivating fact for believing that the offense was gang-related; apparent purpose of the gang evidence was to "stir the emotions of the jury."

People v. Johnson, 215 Ill.App.3d 713, 575 N.E.2d 1247 (1st Dist. 1991) In a jury trial for first degree murder, the probative value of evidence that a trace of semen was found in the victim's mouth and that defendant was bisexual was outweighed by the prejudicial effect; the semen was not linked to the defendant, and no sexual offenses were charged.

People v. Maberry, 193 Ill.App.3d 250, 549 N.E.2d 974 (4th Dist. 1990) Evidence offered to show that someone other than the defendant may have committed the crime is relevant and admissible "only if and when a close connection can be demonstrated between the third person and the commission of the offense."

The trial judge did not abuse discretion in excluding evidence purporting to show that a third party (Leonard) may have committed the crimes (home invasion and sexual assault); although the third party was seen in the area on the relevant date, resembled the physical description of the perpetrator, and may have had a motive, the victim stated that he was not her attacker. In addition, the third party's description differed from the attacker in terms of voice, gait and husky build

People v. Barnes, 182 Ill.App.3d 75, 537 N.E.2d 949 (1st Dist. 1989) At the defendant's trial for unlawful use of weapons, it was error for the State to introduce evidence regarding a large sum of money ($4,000) on the defendant. It was improper for the State to bring out certain aspects of defendant's lifestyle, such as that he had two children by different women and that he had employment-related misconduct. This evidence was irrelevant to proving the offense charged, yet improperly suggested that it was obtained by illegal means.

People v. Fuelner, 104 Ill.App.3d 340, 432 N.E.2d 986 (1st Dist. 1982) Testimony regarding the rape complainant's suicide attempt and five-week hospitalization in a psychiatric ward was improperly admitted into evidence; the testimony was irrelevant to defendant's guilt or innocence and prejudiced the jury against him.

People v. Malkiewicz, 86 Ill.App.3d 417, 408 N.E.2d 47 (2d Dist. 1980) At defendant's trial for several sex offenses, it was error to admit testimony about the titles of four novels found in the defendant's car (the books were entitled "***Death List," "Tempting Teenagers," "Trapped and Tied Babysitters," and "The Curious Nurse***"). Because the prosecution failed to show whether the books belonged to the defendant, whether he had read them, or the books' content, the books were not shown to have any relevance or materiality to the crime charged or to the defendant's state of mind. Furthermore, the books were not shown to be an instrumentality of the crime.

The court concluded that the book titles were introduced solely to suggest the defendant's propensity to commit crime. See also, **People v. Pulliam** 176 Ill.2d 261, 680 N.E.2d 343 (1997) (book entitled "The Force of Sex" was improperly admitted where there was no evidence of the book's contents or that defendant had read it).

People v. Myaden, 71 Ill.App.3d 442, 389 N.E.2d 901 (4th Dist. 1979) Evidence that an accomplice has been convicted or pleaded guilty, or that an accomplice had been found not guilty, was irrelevant in regard to defendant's guilt or innocence.

People v. Reimnitz, 72 Ill.App.3d 761, 391 N.E.2d 380 (1st Dist. 1979) Evidence that defendant engaged in homosexual act over seven months after he allegedly murdered his wife was improperly admitted, since its probative value was far outweighed by its inflammatory effect.

§19-3
Limited and Curative Admissibility

Illinois Supreme Court

People v. Bradford, 106 Ill.2d 492, 478 N.E.2d 1341 (1985) To reduce the risk that a jury might consider impeachment as substantive evidence, an instruction concerning the limited use of the evidence should be given. See also, People v. Mitchell, 27 Ill.App.3d 117, 327 N.E.2d 158 (1st Dist. 1975) (reversible error for trial judge to refuse defendant's tendered instruction on the limited use of prior inconsistent statements).

People v. Payne, 98 Ill.2d 45, 456 N.E.2d 44 (1983) Where during cross-examination of an arresting officer, defense counsel asked whether the defendants and the apartment were searched, the State was allowed to introduce suppressed evidence to rebut the false impression that nothing had been found in the search.

People v. Monroe, 66 Ill.2d 317, 362 N.E.2d 295 (1977) Evidence that is admissible for one purpose cannot be excluded because it would not be admissible for another purpose. However, the party against whom it is admitted may request appropriate instructions limiting the purpose for which it may be considered.

Illinois Appellate Court

People v. Kruel, 2022 IL App (1st) 200721 Before his trial for sexual assault and battery, defendant filed a motion *in limine* to admit evidence that two unidentified DNA samples were discovered in the complainant's rape kit. The State objected, citing the rape shield rule, 725 ILCS 5/115-7(a). Section 115-7(a) bars evidence of a victim's prior sexual activity in sexual assault cases except under certain limited circumstances. The trial court initially granted the motion in part, ruling that evidence of the DNA was admissible substantively, but not admissible to impeach the complainant's prior statement that she did not have sexual relations within 72 hours of the rape kit. However, after opening statements, the court revised its ruling and barred all evidence of the unidentified DNA profiles.

Defendant was acquitted of sexual assault and convicted of aggravated battery. On appeal, he challenged the trial court's decision to bar the evidence of other DNA profiles, but the Appellate Court affirmed. The rape shield statute provides only two exceptions to the bar on evidence of sexual history in sex offense cases: (1) when consent is an issue and defendant seeks to introduce prior sexual activity between himself and the victim; or (2) when the evidence is constitutionally required to be admitted.

Defendant here alleged that the ruling violated his sixth amendment right to present evidence in his defense. Courts have held that this right takes precedence over the rape shield statute when evidence of sexual history is directly relevant to the case, *e.g.* to show the victim's bias, prejudice, or motive; to negate the establishment of an element of the crime charged; or to explain physical evidence, such as semen or pregnancy. But in this case, the evidence had no direct relevance. The defense theory at trial was that defendant did not commit the act. Evidence that the complainant had recent intercourse did not bear on that theory. Nor was it directly relevant to the complainant's allegation that intercourse did occur despite the lack of defendant's DNA, as the timing of the rape kit – 24 hours after the assault – and her testimony that defendant did not ejaculate, offered alternative explanations.

Finally, the evidence was not admissible under the doctrine of curative admissibility. The doctrine allows the introduction of otherwise inadmissible evidence in order to rebut evidence presented by the opposing party that would cause undue prejudice. Here, although the State argued that the rape kit produced no DNA results, this misleading assertion did not cause defendant undue prejudice. The jury's belief that no DNA evidence was found was helpful to defendant's case, and it would not have necessarily become more helpful had the jury known about the other profiles. Thus, while the State erred in arguing that "no DNA"

was found, any such error was harmless and did not elicit a need for the doctrine of curative admissibility.

People v. Hinthorn, 2019 IL App (4th) 160818 Defendant's wife testified against him in a trial for the predatory criminal sexual assault of their daughter. Some of the counts alleged that defendant acted as an accomplice to his wife during one of the assaults. The State's pre-trial request to admit other crimes evidence of prior sexual assaults by defendant against his wife had been denied.

Defendant's wife testified that she was forced to engage in a sex act with her daughter out of fear that defendant would beat her. Defendant's cross-examination attacked this testimony by highlighting prior inconsistent statements. The trial court allowed the State to then admit the other crimes evidence because the cross-examination opened the door. The Appellate Court agreed, holding that under the doctrine of curative admissibility the other crimes evidence was necessary to give the jury the complete picture of the wife's state of mind. The Appellate Court rejected, however, the State's assertion that the evidence was admissible under the completeness doctrine, which applies to communications, not acts.

People v. Degorski, 2013 IL App (1st) 100580 Occupation (reputable or disreputable) is an ordinary part of the background information elicited from any witness, and is properly considered in determining the weight to be given to the testimony of the witness.

It was not an abuse of discretion for the court to allow the former assistant State's Attorney who obtained a confession from the defendant to testify that he was now a judge, particularly where the State complied with the court's direction that it not give that fact undue emphasis, and the State did not argue that the jury should give the testimony of the witness greater weight because he was a judge. While a judge's occupation may lend an air of credibility to his testimony, the trier of fact is still free to disbelieve the witness.

The defense did not invite the former assistant State's Attorney's testimony that he found defendant's confession reliable. Defense counsel asked the witness only a general question about whether he sought to obtain statements that were uncontaminated by outside information. The answer was not a direct response to the question and was volunteered. The defendant could not complain about the witness's subsequent testimony that he believed the defendant when he confessed because that testimony was elicited when defense counsel continued to question the witness about his opinion of defendant's confession.

Much like police officers, assistant State's Attorneys are authority figures whose testimony may be prejudicial if they inform jurors that they should believe the prosecution's case. But there is a distinction between an assistant State's Attorney testifying to a prior opinion of belief in a defendant's statement at the time it was made, and offering a present opinion of defendant's guilt at trial. Present opinion testimony is improper; previous opinion testimony is permissible.

The testimony of a former assistant State's Attorney that he believed defendant's confession at the time of its making was not a present opinion of defendant's guilt and was permissible.

People v. Mandarino, 2013 IL App (1st) 111772 Defendant, a former police officer, was prosecuted for aggravated battery after he beat a motorist with a collapsible baton during a traffic stop. On appeal, defendant argued that the trial erred by admitting lay opinion that defendant's use of force against the motorist was unreasonable and unnecessary.

The lay opinion was admissible on two theories - to rebut character evidence and under the doctrine of curative admissibility. The court concluded that the defense introduced

character testimony by eliciting evidence of defendant's exceptional performance and service records. Character evidence is generally inadmissible in a criminal trial unless introduced by the defendant, in which case the State is permitted to respond by offering its own character evidence. (Illinois Rule of Evidence 404). Here, the State rebutted the defense evidence of the accused's good character by showing that in light of the incident leading to the instant charges, the witness no longer viewed defendant as an excellent officer.

The evidence was also admissible under the curative admissibility doctrine, which allows the State to respond on redirect examination where the defendant has opened the door to a particular subject, even if the response elicits what would otherwise be inadmissible evidence. The purpose of the curative admissibility doctrine is to shield a party from unduly prejudicial inferences raised by the other side. Whether to allow curative evidence lies in the sound discretion of the trial court.

The court concluded that admitting the lay opinion of the witness, a deputy chief, "allowed the State to cure any impression . . . that [the witness] still regarded [defendant] to be an outstanding officer."

People v. Santiago, 409 Ill.App.3d 927, 949 N.E.2d 290 (1st Dist. 2011) Just as evidence of a co-defendant's confession is inadmissible as evidence of defendant's guilt, evidence that a co-defendant pleaded guilty or was convicted is inadmissible as evidence of defendant's guilt. A defendant is entitled to have his guilt or innocence determined based on the evidence against him without being prejudged according to what has happened to another. **People v. Sullivan**, 72 Ill.2d 36, 377 N.E.2d 17 (1978).

The court held that this rule was not violated where the prosecutor elicited from the co-defendants that they had pleaded guilty, but in the context of admitting statements that they had made at their plea hearings acknowledging the accuracy of their post-arrest statements. The post-arrest and guilty-plea statements inculpating defendant were admitted as substantive evidence pursuant to 725 ILCS 5/115-10.1 as they were inconsistent with the co-defendants' testimony at trial. The State never argued to the jury or even suggested that the co-defendants' guilt was evidence of defendant's guilt.

Nor was it error to elicit evidence of the sentences that the co-defendants received. The jury was not informed of the sentences for the improper purpose of suggesting that defendant faced a comparable sentence if convicted, but to emphasize the doubtful explanation offered by the co-defendants for their decision to plead guilty.

It was also not error for the prosecutor to elicit evidence that defendant was not present when the co-defendant pleaded guilty. This evidence was offered to provide a plausible explanation for the co-defendant's contrary testimony at trial, i.e., that defendant's absence at the plea hearing made it easier for the co-defendant to testify to defendant's guilt, and defendant's presence at trial made it difficult for the co-defendant to repeat that testimony.

Justice Robert E. Gordon specially concurred. It was error, although harmless, to elicit evidence of co-defendants' guilty pleas, where it was not necessary to elicit that evidence in order to introduce the prior inconsistent statements they made at the plea hearing.

People v. Villa, 403 Ill.App.3d 309, 932 N.E.2d 90 (2d Dist. 2010) A defendant may "open the door" to what would otherwise be inadmissible evidence by testifying in a manner which can be reasonably construed as an attempt to mislead the jury. Here, defendant "opened the door" to evidence of his prior juvenile adjudication.

Defendant claimed that he gave police a false statement because he was afraid, and because he had "never been in a situation like that before." Defendant also stated, "I've never

been in prison or nothing like that." Because 18 months earlier defendant had given the same two officers a statement about a different offense, "it is not unreasonable to construe [his] attempt to portray himself as unseasoned" as an attempt to mislead the jury.

People v. Limon, 405 Ill.App.3d 770, 940 N.E.2d 737 (2d Dist. 2010) At defendant's trial for robbery and aggravated battery, the State introduced evidence that 11 days following the offense in which complainant was robbed by two men, the police observed defendant and another man in dark clothing. Defendant first hid in a shadow, then ran when one of the officers identified himself as a policeman. The officer saw defendant grab at his waistband, trip, and fall. A handgun fell out of his pants. Defendant clenched his hands at his chest when the police attempted to handcuff him, causing the police to hit defendant in the face and rib cage with fists to effect his arrest. The court instructed the jury to consider that evidence for the limited purpose of explaining the circumstances of the arrest.

The Appellate Court concluded that the court abused its discretion in admitting evidence of defendant's possession of the handgun. The probative value of evidence that defendant possessed a gun 11 days after the offense did not outweigh the prejudicial effect of this evidence where the charged offense did not involve any element of possession or use of a weapon.

Presentation of irrelevant, prejudicial evidence of the gun was not justified based on the hypothetical possibility that defendant would claim that he was coerced into making incriminating statements by police brutality. Evidence of the gun was not necessary to rebut a theory of coercion because defendant's refusal to put his hands behind his back was sufficient to explain the officers' use of force in effecting the arrest. Although defendant had not informed the court that he would not pursue a theory of coercion and police brutality, a defendant is not required to forgo, in advance, a potential defense to preclude the State from introducing irrelevant, prejudicial evidence. Even if defendant had advanced a theory of coercion, evidence of the gun was not relevant.

People v. Liner, 356 Ill.App.3d 284, 826 N.E.2d 1274 (5th Dist. 2005) Where the defense established that a State's witness did not like the defendant, the State was not invited to elicit, under the doctrine of curative admissibility, that the basis for the dislike was that defendant had sold the witness fake drugs. The error was compounded when the prosecutor argued that defendant owned a Cadillac and had nice clothes because of his drug trade.

People v. Godina, 223 Ill.App.3d 205, 584 N.E.2d 523 (3d Dist. 1991) A prosecutor may not offer evidence for a limited purpose and then make impermissible use of the evidence during closing argument. Where evidence that defendant had left town after the offense was admitted to show why no gunpowder tests were performed on his hands, the prosecutor erred by arguing to the jury that defendant's flight showed a consciousness of guilt.

People v. Robinson, 121 Ill.App.3d 1003, 460 N.E.2d 392 (1st Dist. 1984) Trial judge did not err in failing to give a limiting instruction *sua sponte*.

People v. Garza, 92 Ill.App.3d 723, 415 N.E.2d 1328 (3d Dist. 1981) When evidence such as a prior inconsistent statement is introduced for a limited purpose, the trial judge normally has no duty to issue a limiting instruction *sua sponte*. Such a duty may exist when a prior statement is "extraordinarily long and repetitious such that the conviction becomes based upon unsworn statements" and where the prosecutor urges the jury to consider an unsworn statement as substantive evidence.

§19-4
Direct and Circumstantial Evidence

Illinois Supreme Court
People v. Rhodes, 85 Ill.2d 241, 422 N.E.2d 605 (1981) Circumstantial evidence is the proof of certain facts and circumstances from which the jury may infer other connected facts, which usually and reasonably follow according to common experience.

Fingerprint evidence is circumstantial evidence which attempts to connect the defendant to the offense alleged.

People v. Panus, 76 Ill.2d 263, 391 N.E.2d 376 (1979) Testimony that defendant admitted taking property from the victim's premises was direct evidence of guilt of burglary.

Illinois Appellate Court
People v. Stokes, 95 Ill.App.3d 62, 419 N.E.2d 1181 (1st Dist. 1981) Direct evidence is proof of a fact without the necessity of inference or presumption, or evidence of a fact perceived by means of a witness's senses.

People v. Spataro, 67 Ill.App.3d 69, 384 N.E.2d 553 (3d Dist. 1979) Defendant's statements explaining how the incident occurred constituted direct evidence.

§19-5
Demonstrative and Physical (Real) Evidence

Illinois Supreme Court
People v. Alsup, 241 Ill.2d 266, 948 N.E.2d 24 (2011) Before the State can introduce results of chemical testing of a purported controlled substance, it must provide a foundation for its admission by showing the police took reasonable protective measures to ensure that the substance recovered from the defendant was the same substance tested by the forensic chemist. Once the State establishes this *prima facie* case, the burden shifts to the defense to show actual evidence of tampering, alteration, or substitution. The State need not produce every person in the chain of custody to testify, nor must the State exclude every possibility of tampering or contamination. Deficiencies in the chain of custody go to the weight, not the admissibility, of the evidence.

Because the chain of custody establishes the foundation for the admission of the testing as relevant and admissible, a challenge to the chain of custody is not a challenge to the sufficiency of the evidence, and is not exempt from forfeiture. When a challenge to the chain of custody is not preserved for review, it may be considered only under the plain-error doctrine. The plain-error doctrine applies only if there is a complete breakdown in the chain of custody, amounting to a complete failure of proof, where there is no link between the substance tested and the substance recovered by the police. **People v. Woods**, 214 Ill.2d 455, 828 N.E.2d 247 (2005), did not create a *per se* rule that plain error occurs where there is a mismatch between the inventory numbers of descriptions of the items recovered and items received. **Woods** merely hypothesized that such mismatches could be reviewable as plain error where there is a dearth of other evidence of the chain of custody.

The State met its burden of a *prima facie* case that the items recovered and tested were the same, and the defense did not satisfy its burden of rebutting this case with evidence of actual tampering, alteration and substitution. A police officer testified that he recovered

five tinfoil packets of suspected heroin and ten baggies of suspected cocaine and used reasonable protective measures to ensure the safekeeping of the evidence from the time that he seized it until it was placed in an evidence vault in a heat-sealed package. The parties stipulated that the forensic chemist received a heat-sealed package with the same inventory number as testified to by the officer, and that the chemist would testify to the maintenance of a proper chain of custody "at all times." Even though the stipulation also specified that the chemist received and tested nine items of suspected heroin, this discrepancy only went to the weight, not the admissibility, of the evidence as there was no complete breakdown in the chain of custody.

Also with regard to the five-versus-nine discrepancy, the court concluded that any issue as to the chain of custody was entirely removed from consideration by the stipulation because the defense action in agreeing to the stipulation deprived the State of the opportunity to correct or explain the discrepancy.

People v. Woods, 214 Ill.2d 455, 828 N.E.2d 247 (2005) When the State seeks to introduce an object into evidence, it must lay an adequate foundation by either identifying the object or establishing a chain of custody. Where physical evidence is not readily identifiable or may be susceptible to tampering, the prosecution must show a chain of custody that is sufficiently complete to make it improbable that the evidence has been subjected to tampering or substitution.

To establish a *prima facie* showing concerning the chain of custody for controlled substances, the State must present evidence that reasonable measures were taken to protect the evidence. Once the State establishes a *prima facie* case, the burden shifts to the defendant to produce evidence of actual tampering or substitution. If such evidence is produced, the burden shifts to the State to rebut the claim. The defendant need not introduce evidence of actual tampering or substitution unless the State has established a *prima facie* case.

A defendant may waive the necessity of proving chain of custody by agreeing to a stipulation with respect to the evidence. The primary rule for interpreting stipulations is to ascertain and give effect to the intent of the parties. Generally, a defendant is precluded from attacking or contradicting facts to which he or she stipulated.

In addition, the defendant waives a challenge to the chain of custody where he fails to object at trial and raise the issue in a post-trial motion. Although the defendant is not required to raise a trial-level challenge to the sufficiency of the evidence, the court concluded that objections to the chain of custody involve the foundation for the admission of evidence, not the sufficiency of the evidence.

The plain error rule may apply where there is a complete breakdown in the chain of custody, including where the inventory numbers or descriptions of the recovered and tested items do not match. The plain error rule did not apply where: (1) the arresting officer testified that: (a) he recovered three zip-lock packets containing tin foil packets, (b) the packets were inventoried under a specified inventory number, and (c) "standard Chicago Police Department procedures" were followed with regard to inventorying the items, and (2) the parties stipulated that a forensic chemist: (a) received evidence under the same inventory number, (b) found the same number of packets in a sealed condition, and (c) performed tests which were positive for the presence of heroin.

In addition, defendant affirmatively waived any challenge by agreeing to a stipulation intended to eliminate any dispute with respect to the chain of custody. The court found that the State would not have agreed to stipulate to the forensic chemist's testimony, and thereby forfeit that testimony, unless the stipulation was intended to remove possible chain of custody issues. The court also noted that at trial defense counsel concentrated on whether the State

had proven that defendant possessed the controlled substance, and did not claim that the evidence had been compromised.

People v. Blue, 189 Ill.2d 99, 724 N.E.2d 920 (2000) The trial court abused its discretion by allowing the State to introduce a headless mannequin wearing the bloody and brain-splattered uniform of a deceased police officer, and by allowing the exhibit to be taken to the jury room. A uniform containing stains from the decedent's blood and brain matter is "uniquely 'charged with emotion.'" In addition, the jurors were exposed to the mannequin for an extended period of time both in the courtroom and during deliberations and were given rubber gloves to facilitate handling the exhibit in the jury room. Compare, **People v. Henenberg**, 55 Ill.2d 5, 302 N.E.2d 27 (1973) (demonstration involving the use of a model of a human skull was proper as a useful adjunct to pathologist's testimony as to the cause of death); **People v. Mitchell**, 78 Ill.App.3d 458, 397 N.E.2d 156 (1st Dist. 1979) (plastic torso). **People v. Pulliam**, 176 Ill.2d 261, 680 N.E.2d 343 (1997) Generally, physical evidence may be admitted if there is proof to connect it to the defendant and the crime. However, evidence is inadmissible where its probative value is limited due to remoteness, uncertainty or unfair prejudice.

Where there was no testimony that defendant owned or had read a book found in his apartment after the offense, and no indication of its contents, there was no sound basis to believe it was relevant to the crimes. In addition, the fact that the defendant's apartment was unsecured for two days before the book was found "further diminished the book's relevance to defendant's role in the crimes." See also, **People v. Miller**, 173 Ill.2d 167, 670 N.E.2d 721 (1996) (testimony about women's clothing found in the apartment of a murder defendant was improperly admitted where the garments were not linked to any of the victims).

People v. Williams, 161 Ill.2d 1, 641 N.E.2d 296 (1994) A fair sentencing hearing was denied by the prosecution's use of an eight-foot poster to display defendant's prior criminal record and criminal acts for which no convictions had occurred. Although the trial court may allow demonstrative aids that assist the jury in understanding testimonial evidence, a demonstrative exhibit may not merely summarize clearly understandable testimony. Because defendant's criminal history had been presented through certified copies of his convictions and by simple testimony, there was no legitimate need for a chart that "unfairly memorialized and unduly emphasized the evidence in aggravation."

The chart was especially prejudicial because in closing argument the prosecutor claimed to be outraged because defendant's criminal past was "eight feet tall." See also, **People v. Kinion**, 105 Ill.App.3d 1069, 435 N.E.2d 533 (3d Dist. 1982) (improper to allow chart to summarize diagnosis that defendant was sane).

In addition, a police officer who had been a principal State witness at trial should not have been allowed to tape the placards containing defendant's criminal history to the chart. Although the officer did not testify at the sentencing hearing, use of a police officer both as a witness and to assist the prosecution creates an unfair risk of prejudicing the jury.

People v. Fierer, 124 Ill.2d 176, 529 N.E.2d 972 (1988) Generally, weapons are admissible if they are connected to the defendant and the crime. However, the State is not required to prove that the weapon found was the one actually used. Where there is evidence that a particular type of weapon was used in the crime and a similar weapon was found, the jury may reasonably infer that it was the one used to commit the offense.

However, when a completely different weapon or instrumentality is discovered, "[a]t some point the chain of inferences becomes so attenuated that the probative value of the evidence is outweighed by its prejudicial effect." Where the victim was killed by stab wounds, it was error for the State to introduce bottles of potassium cyanide and secobarbital which were found in defendant's car on the day of the killing.

People v. Panus, 76 Ill.2d 263, 391 N.E.2d 376 (1979) The Supreme Court upheld the admission of a ground tiller into evidence although it was not identified by a serial number and had no peculiar characteristics. The trial judge may admit an item in to evidence when it is positively identified by a witness (the victim in this case) and is relevant.

The failure to identify an item by serial number is not fatal to its admission, but such a perceived weakness may be argued to the trier of fact. Likewise, an item's lack of peculiar characteristics is not fatal when the circumstances sufficiently connect the item with the crime and the defendant.

People v. Leeman, 66 Ill.2d 170, 361 N.E.2d 573 (1977) A plastic bag of LSD was properly admitted into evidence where police officers and a chemist identified the bag.

People v. Newbury, 53 Ill.2d 228, 290 N.E.2d 592 (1972) Evidence is not admissible if its relevance depends on an unproved assumption. Torn photo of accused found in effects of victim, offered to show disagreement about their planned marriage, was not admissible without a showing that it had been recently and deliberately torn by victim.

Illinois Appellate Court

People v. Reynolds, 2021 IL App (1st) 181227 The trial court did not abuse its discretion in finding that the State laid an adequate foundation for admission of recorded jail phone calls under the silent witness theory. The State presented testimony about how the automated call system worked and how the records of such calls were maintained and retrieved. While the phone call system did not use a voice recognition feature, the process was sufficiently reliable to establish a reasonable likelihood that the calls were made by defendant, and that defendant was the male voice heard on the recordings of those calls.

People v. Middleton, 2018 IL App (1st) 152040 The State improperly introduced a demonstrative exhibit in its rebuttal closing argument. The State's eyewitness testified that he could identify defendant despite the fact that the offender wore a ski mask which covered the lower half of his face. In its rebuttal, the State showed the jury defendant's mugshot with a black circle over the lower half of defendant's face and argued that defendant was still recognizable.

The Appellate Court found the trial court should have granted the defense motion for a mistrial. The State did not show the exhibit to the defense and it did not lay a foundation. To use the demonstrative exhibit, the State should have sought to introduce it at trial by presenting it to the eyewitness to determine whether it accurately reflected his view of the offender. The idea that the exhibit could be "invited" comment is "palpably offensive" because the State obviously expected a mistaken-identification defense given that it was announced in the defense opening statement, and the State had prepared this exhibit ahead of time. In a single-eyewitness-identification case, the evidence was close and the error could not be considered harmless.

People v. White, 2017 IL App (1st) 142358 Defendant was convicted in a bench trial of delivery of a controlled substance. The officer who conducted the controlled buy testified that he did not remember seeing scars on the seller's face or tattoos on his body. Similarly, the surveillance officer testified that he had a clear and unobstructed view of the seller, who was wearing a white tank top, and that he did not observe any tattoos on the seller's body.

Defense counsel sought to demonstrate tattoos on defendant's arms to the trial judge. The judge allowed the defendant to show the top of his right arm but only with the palm down. In denying counsel's request that defendant be allowed to show the tattoos on his right arm with his palm up, the judge stated that defense counsel had not asked the officer whether defendant's palm was up or down. The record showed that defendant had a tattoo from elbow to wrist on his forearm, but the judge stated that the tattoo could not be seen when defendant had his palm down.

The trial judge also found that it was irrelevant that defendant had a tattoo on his left arm because the record showed that the seller performed the transaction with his right arm. In addition, the trial court overruled defense counsel's objection that the judge was observing defendant's tattoos while on the bench and from above, instead of standing next to defendant as the officer had done when conducting the buy.

The officer who conducted the buy was recalled and testified that he did not remember how defendant's hand was positioned during the transaction. However, the officer demonstrated how defendant reached toward him during the buy, and the trial court stated that the officer's arm was extended with the palm down.

The Appellate Court found that defendant was denied a fair opportunity to present his defense that he had been misidentified because the trial court required defendant to show his forearm with the palm down, refused to allow defendant to show the tattoo on his left arm, refused to permit the officer who conducted the buy to identify defendant's tattoos in court, and refused to allow defendant to demonstrate that his tattoos would have been visible from the officer's position at the time of the offense. Evidence that the tattoos would have been visible to the officer at the time of the transaction would have been probative and relevant to the credibility of the officer's identification.

The trial court also erred by refusing to allow defense counsel to introduce evidence regarding the tattoos on defendant's left arm. The court deemed such evidence irrelevant, because the seller conducted the transaction with his right arm. However, the officer who made the buy would have been able to observe the seller's left arm, so the ruling denied defendant a fair opportunity to challenge the officers' identification by showing that he had a tattoo on his left arm which extended from elbow to wrist.

People v. Betance-Lopez, 2015 IL App (2d) 130521 The trial court may admit a written transcript of a recording to assist the trier of fact. However, it is the recording itself, and not the transcript, that constitutes evidence.

The court concluded that the general rule is "impractical, or even impossible," where the recording contains statements in a foreign language. In such a case, it is not possible for the trier of fact to rely on the recording to the exclusion of an English translation. Thus, where the recording contained questions and answers in Spanish which were then translated by one of the officers conducting the interrogation, the trial court did not err by admitting a subsequently prepared English transcript as substantive evidence.

The court rejected the argument that because the recording contained the officer's English translation of statements which defendant made in Spanish, the trial court should not have relied on the subsequently-prepared transcript. The court noted that the translator who prepared the transcript had the luxury of listening to the recording, multiple times if

necessary, to ensure that the translation was accurate. In addition, defendant conceded that there was a proper evidentiary foundation for the transcript. Under these circumstances, the trial court did not err by admitting the transcript.

People v. Montes, 2013 IL App (2d) 111132 An adequate foundation for the admission of a sound recording as demonstrative evidence exists if a witness to the recorded conversation testifies that the recording accurately portrays the conversation in question. Admission of the recording substantively requires that a proper foundation be laid demonstrating the accuracy and reliability of the process that produced the recording. Each case must be evaluated on its own. The factors examined to determine whether the foundation is adequate vary depending on the facts of each case.

A prosecution witness testified that the recording was an accurate recording of the conversations and events that he witnessed and recorded. An FBI agent testified that she gave the witness the recording device. The witness testified that he turned on the device. The fact that the recording exists is evidence that the device was functional and that the witness knew how to operate it. The agent met with the witness after the events and took the recording from him.

This evidence was sufficient foundation for the admission of the recording even though there is no evidence to whom the agent gave the recording and who transferred the recording onto a CD. A strict chain of custody is not necessary as long as there are other factors demonstrating the authenticity of the recording. Here the witness testified that he gave the recording to the agent, the agent testified that she received it from witness and took it to be downloaded, and the witness testified that he listened to the downloaded recording and it was accurate. Any gaps in the chain of custody go to the weight, not the admissibility, of the evidence.

The trial court did not abuse its discretion in allowing the jury to follow along on a transcript of a recording prepared by the FBI while the recording was played at trial, where the court instructed the jury that the transcript was only a guide. The recording itself was admitted into evidence. The court collected the transcript after the jurors heard the recording, and denied the jury's request for the transcript during deliberations. A witness who was present at the recorded conversation identified the speakers, who were not identified on the transcript. While the witness testified that at one point the transcript did not accurately reflect what was recorded, the witness explained the alleged inaccuracy to the jury, and the jury was free to accept or reject the explanation.

People v. Dennis, 2011 IL App (5th) 090346 The State provided a sufficient foundation, under the "silent witness" theory, to admit a surveillance tape and three still photographs created from the tape. After an armed robbery was reported, a crime scene investigator went to the scene. He then asked the owner of the security company which had installed the security system to come to the store. The investigator and the security company owner watched the videotape at the store. At the request of the investigator, the security company owner burned two copies of the tape on CD's. The investigator took one of the CD's to his office and labeled it to show the date and the name of the person who had created it.

The court noted the failure of the defense to claim that the recording was not authentic or accurate, and held that in the absence of actual evidence of tampering the State is required to show only a probability that no tampering, substitution, or contamination occurred.

Defendant's conviction for armed robbery was affirmed.

People v. Flores, 406 Ill. App.3d 566, 941 N.E.2d 375 (2d Dist. 2010) Videotape and photographic evidence may be admitted at trial for one of two purposes: (1) as demonstrative evidence, or (2) as substantive evidence. A foundation for the demonstrative use of a videotape is established by the testimony of a witness with personal knowledge of the photographed object that at the time relevant to the issue, the videotape is a fair and accurate representation of the object. When a tape is used as demonstrative evidence, the fact that it has been edited goes to weight rather than admissibility.

Where a videotape is admitted as substantive evidence, by contrast, an adequate foundation requires a showing that the original videotape has been preserved without change, addition or deletion. If a copy of the tape is introduced, there must be an explanation of the copying process which satisfies the court that there were no changes, additions or deletions in the exhibit that was admitted at trial. Due to the ease with which digital images can be manipulated with modern editing software, the State may be required to show a chain of custody which shows that the image has not been altered.

At defendant's trial for driving with a suspended or revoked license, a witness testified that a video which he took was an accurate portrayal of the defendant's actions at the time of the offense. However, the witness also admitted that the exhibit was a copy of the original tape and that he had erased images which concerned personal matters unrelated to the offense. Because the exhibit was not the original tape but an edited copy, and because the witness "seemed to go out of his way to obscure the process by which he produced" the exhibit and made "reconstructing the process . . . a matter of guesswork," the exhibit was admissible only as demonstrative evidence. Because the trial court abused its discretion by relying on the tape as subjective evidence, the conviction for driving with a revoked or suspended license was reversed and the cause remanded for a new trial.

People v. Taylor, 398 Ill.App.3d 74, 922 N.E.2d 1235 (2d Dist. 2010) Where the State sought to admit a VHS tape which had been created from data stored on the hard drive of a surveillance device, it was required to lay a foundation which showed both the reliability of the device which recorded the original digital image and the reliability of the process by which the digital image was converted to an analog format and placed on the tape.

Unless a colorable attack is made concerning the recording's authenticity and accuracy, the proponent of the evidence is generally required to show a probability that tampering, substitution or contamination did not occur. Factors relevant to the reliability and relevancy of a recording include the capability of the recording device, competency of the operator, proper operation of the device, preservation of the recording without changes, and identification of any speakers. A chain of custody will generally be required to show that the State took reasonable protective measures and that no alteration likely occurred. Finally, evidence of any copying process must show that there were no changes, additions or deletions to the recording.

A chain of custody is unnecessary where an item of evidence is "relatively impervious to change." However, given the availability of modern editing capabilities, a digital recording is clearly not impervious to change.

Here, the State failed to establish even the probability that the recording, which purportedly showed the defendant in an office from which money was stolen, had not been subjected to tampering. The tape contained several "jumps" which were not explained by the testimony concerning the operation of the device, and there were unresolved issues concerning the capability and proper operation of the recording devices.

People v. Blankenship, 406 Ill.App.3d 578, 943 N.E.2d 111 (2d Dist. 2010) Where an item is readily identifiable, has unique characteristics, and is not easily subject to change, an adequate foundation consists of testimony that it is the item that was recovered and is in substantially the same condition. If the item is not readily identifiable and may be susceptible to tampering, the State must establish a chain of custody. Suspected controlled substances are not readily identifiable and may be susceptible to tampering, and thus require a chain of custody.

Where the State fails to produce testimony from every person in the chain of custody, it may establish a sufficient foundation by showing that a "unique identifier" was placed on the evidence and that the code on the container sent out matched the code on the container which the next custodian received. The State failed to show an adequate chain of custody here; although a "case number" was placed on the container of suspected cocaine seized from the defendant and a similar code was on the container received by the crime lab, there was no testimony as to what the number signified or that it was unique to the defendant. Because more than one person was arrested during the incident, the case number may have been a general designation for the search warrant or the incident as a whole, and not a unique identifier for evidence seized from the defendant.

A second method by which the State might establish a *prima facie* chain of custody without calling every person in the chain is by showing that the condition of the evidence when delivered to one custodian matched the description of the evidence when it was transmitted by an earlier custodian. Here, the State satisfied this method - the officer who processed the suspected cocaine seized from the defendant testified that the exhibit introduced at trial was in the same or substantially the same condition as when he last saw it, except that the Illinois State Police Lab had opened the bottom of the package and divided the substance into two parts. That testimony was consistent with the lab analyst's testimony concerning her treatment of the exhibit as part of the testing process. In addition, the analyst testified that the weight of the sample she received was consistent with the weight of the sample transmitted by the officer.

Because the State made a *prima facie* showing of a chain of custody, defendant had the burden of producing evidence of actual tampering, substitution, or contamination. Defendant failed to offer such evidence by supplementing the record with police reports showing that suspected cocaine was seized from more than one person during the incident. Because the police reports were not introduced at trial, they could not be considered on appeal. In the absence of the reports, the record showed that more than one person was arrested in the incident, but not that suspected controlled substances were seized from anyone other than the defendant.

People v. Hunt, 381 Ill.App.3d 790, 886 N.E.2d 409 (1st Dist. 2008) A partly inaudible sound recording is inadmissible if the inaudible portions are so substantial as to render the recording untrustworthy as a whole. Whether a partially audible recording should be admitted is a matter of the trial court's discretion.

The trial court did not abuse its discretion by finding that tapes were so inaudible as to be useless.

People v. Whirl, 351 Ill.App.3d 464, 814 N.E.2d 872 (2d Dist. 2004) The State failed to provide a sufficient chain of custody to sustain a conviction for possession of a controlled substance where the evidence showed that defendant spit out one packet during a search of his mouth, but the officer testified that he recovered two "packs." In addition, the recovering officer gave the items to unidentified officers from another police department, and the

stipulation concerning the crime lab analyst did not indicate when the analyst received the baggies or the name of the officer who delivered them. Despite the presence of photographs showing the baggies as they appeared on the night they were recovered, the court concluded that the chain of custody was "missing too many links" concerning the location in which the second baggie was found, the length of time the second baggie was unaccounted for, the identity of person who handled the evidence between the time it was turned over to the transport officers and the time it was delivered to the crime lab, and the date on which the crime lab received the evidence.

People v. Vaden, 336 Ill.App.3d 893, 784 N.E.2d 410 (3d Dist. 2003) A sufficient foundation for the admission of a videotape is established when a witness with personal knowledge of the filmed object testifies that the film is an accurate portrayal of what it purports to show. In addition, under the "silent witness" theory, photographic evidence may be admitted, without the testimony of a witness, if there is sufficient proof that the process which produced the photograph or videotape is reliable.

The court concluded that the tape in this case was properly authenticated on two theories - by the testimony of the officers that it accurately depicted what they observed, and under "silent witness" theory. Concerning the second theory, the court noted that the officer who set up the video equipment testified that it was working properly, that he had set up the equipment on numerous previous occasions, and that no one interfered with the equipment during the incident. There was also testimony that the videotape was placed in a sealed evidence bag until trial, and that it had not been tampered with or altered.

The court concluded that where the officer who set up the equipment testified as to its capability, and said that he had installed such equipment at least 100 times, the tape recorder operated properly, the tape was removed after the conversation and placed in a sealed bag, and a second officer monitored the conversation and testified that the recording accurately represented the conversation, the foundation was clearly adequate to justify admission of the tape.

People v. Lundy, 334 Ill.App.3d 819, 779 N.E.2d 404 (1st Dist. 2002) Evidence of a proper chain of custody is required where physical evidence is not readily identifiable or is susceptible to tampering. The chain of custody is adequate where it shows an improbability that evidence has been changed or tampered with. In the absence of evidence that evidence has been compromised, the State need not exclude every possibility of tampering. Instead, it need show only that it took reasonable steps to protect the evidence and that it is unlikely the evidence has been altered.

Where the State establishes a probability that the evidence was not compromised, any deficiency in the chain of custody goes to weight rather than admissibility, unless the defendant shows actual evidence of tampering or substitution.

The State failed to establish a sufficient chain of custody for suspected controlled substances where it showed only that the substances seized by the arresting officer were filed under the same inventory number as substances delivered to the crime lab. Without more detailed descriptions of the exact number of bags or the nature of the shiny object, the inventory number was the only link between the substance seized from the defendant and that tested by the lab. The court also noted several inconsistencies between the officer's description of the evidence he seized and the items tested by the lab, and the failure of the stipulation to describe the "packages" at all. See also, **People v. Moore**, 335 Ill.App.3d 616, 781 N.E.2d 493 (1st Dist. 2002) (stipulation insufficient to show chain of custody where it omitted any reference to chain of custody, and immediately thereafter moved for a directed

verdict because the chain of custody was inadequate; the State presented no evidence of the procedures employed to protect the evidence, and failed to show that the inventory number of the substance tested by the lab was the same as the number under which the evidence was inventoried; chain of custody issues may be treated either as trial error or as a failure to prove the defendant's guilt beyond a reasonable doubt); **People v. Howard**, 387 Ill.App.3d 997, 902 N.E.2d 720 (2d Dist. 2009) (Illinois law allows the use of unique identifiers, such as police inventory numbers, to show that the same evidence was seized and tested; the foundation was insufficient where inventory number were not used but officers who processed the substance after the arrest testified that they marked the evidence bag with their initials, badge numbers, the date, and other unspecified information).

Defendant did not waive the argument by failing to argue that the narcotics recovered by the arresting officer were contaminated, tampered with or substituted. Because the State failed to sustain its burden of proof concerning the chain of custody, defendant's burden to show actual evidence of tampering or substitution was never triggered.

People v. Smith, 321 Ill.App.3d 669, 749 N.E.2d 986 (1st Dist. 2001) A videotape containing is admissible where the proponent satisfies the foundation requirements for both a motion picture and a sound recording. A sufficient foundation to admit a motion picture occurs where a witness with personal knowledge of the filmed object testifies that the film is an accurate portrayal of what it purports to show. A sufficient foundation to admit a sound recording occurs where a party to the conversation testifies to the accuracy of the recording and there is no claim that changes or deletions have occurred. Where no party to the conversation testifies concerning the accuracy of the recording, a sufficient foundation is established by evidence of the: (1) capability of the device for recording, (2) competency of the operator, (3) proper operation of the device, (4) preservation of the recording with no changes, additions or deletions, and (5) identification of the persons whose speech is recorded.

The State laid a sufficient foundation to introduce a motion picture - a detective testified that he was familiar with the defendant and the principal from seeing them in the neighborhood. However, there was no foundation to admit the audio portion of the videotape; no party to the conversation testified, and there was no evidence concerning the device's capability to record or proper operation, the competency of the operator, or that the recording had been preserved without changes. Thus, the trial court erred by admitting the audio portion and an accompanying transcript.

People v. Davenport & Clemons, 301 Ill.App.3d 143, 702 N.E.2d 335 (1st Dist. 1998) The court criticized the State for requiring defendant to physically exhibit his tattoos in open court. "The State certainly had less inflammatory means of presenting the tattoos to the jury, such as by photographs."

People v. Gibson, 287 Ill.App.3d 878, 679 N.E.2d 419 (1st Dist. 1997) Where evidence is not readily identifiable or is susceptible to alteration, the State must show "a chain of custody of sufficient completeness to render it improbable that the [evidence] has been tampered with, exchanged or contaminated." Where the testimony of a veteran narcotics officer showed that all of the substance recovered weighed approximately 2 grams, the stipulation offered at trial was that the same evidence weighed 9.3 grams, and there was no evidence showing the evidence's handling and safekeeping, the State failed to demonstrate a reasonable probability that the evidence had not been altered or substituted.

People v. Terry, 211 Ill.App.3d 968, 570 N.E.2d 786 (1st Dist. 1991) At a bench trial for possession of a controlled substance, it was error to introduce alleged cocaine where disparities in the number and weight of the bags seized and the color of the powder suggested that the police had commingled evidence from unrelated arrests.
People v. Yelliott, 156 Ill.App.3d 601, 509 N.E.2d 111 (4th Dist. 1987) A gun is "relevant evidence" only if it is connected to the crime. There was no such connection where the gun was not shown to have been in defendant's possession or used in the crime, and the uncontradicted evidence was that the gun had not been used. See also, **People v. Jackson**, 195 Ill.App.3d 104, 551 N.E.2d 1025 (1st Dist. 1990) (error to introduce handgun where only eyewitness to offense testified that the weapon was not the one used); **People v. Fields**, 258 Ill.App.3d 912, 631 N.E.2d 303 (1st Dist. 1994) (error to admit screwdriver found on defendant's person where the complainant testified unequivocally that she had been robbed with a knife; the screwdriver was not connected to the crime).

People v. Slaughter, 149 Ill.App.3d 183, 500 N.E.2d 662 (1st Dist. 1986) There was not a sufficient chain of custody for cannabis allegedly possessed by defendant. Two hand-rolled cigarettes were removed from defendant's wallet and placed in an envelope that was in turn placed in a safe. Two days later a person who identified himself as an employee of the work release center gave an envelope containing two hand-rolled cigarettes to the presiding judge, who in turn gave them to the prosecutor. Neither the judge nor the prosecutor were acquainted with or knew the name of the above person, the guard who removed the cigarettes from defendant's wallet did not identify the envelope or mark and seal it, and the record was inconclusive with respect to whether access to the safe was restricted.

People v. Rhoades, 74 Ill.App.3d 247, 392 N.E.2d 923 (4th Dist. 1979) In establishing chain of custody, the State is not required to exclude all possibility of tampering. In the absence of any tangible suggestion of tampering, alteration or substitution, it is sufficient to prove a reasonable probability that the articles have not been changed in any important respect. The defendant's reliance on the absence of proof of exclusive control at all amounts to mere speculation of alteration, which is insufficient to undermine the foundation laid for the admission of the evidence. See also, People v. Valentin, 66 Ill.App.3d 488, 384 N.E.2d 67 (1st Dist. 1978) (physical evidence was admissible, though the testifying officer could not identify it, where there was proof of chain of custody; State demonstrated reasonable probability that the exhibit had not been changed in any important respect: police placed the item in a sealed, initialed envelope which was locked in a safe, and after opening the sealed envelope and examining the contents the chemist placed the item and envelope into a larger, heat sealed envelope that was identified at trial).

People v. Rose, 77 Ill.App.3d 330, 395 N.E.2d 1081 (1st Dist. 1979) The admissibility of courtroom demonstrations is within the discretion of the trial court. The court did not err in refusing to allow the defendant to demonstrate how nylon stockings distort facial features, because defendant failed to establish that the demonstration would be conducted under conditions and circumstances substantially similar to those existing at the time of the offense. See also, **People v. Soto**, 35 Ill.App.3d 166, 341 N.E.2d 107 (1st Dist. 1975) (trial judge did not abuse discretion by prohibiting demonstration concerning identification where there was insufficient foundation of similarity of conditions).

People v. Mendoza, 62 Ill.App.3d 774, 379 N.E.2d 380 (4th Dist. 1978) Proof of chain of custody was not required when two store security officers identified the items stolen from the store.

People v. Wade, 51 Ill.App.3d 721, 366 N.E.2d 528 (5th Dist. 1977) It was reversible error for the State to elicit testimony about a gun found on the defendant at the time of his arrest, and then stipulate that ballistics would show that the gun was not the murder weapon.

People v. Rogers, 42 Ill.App.3d 499, 356 N.E.2d 413 (3d Dist. 1976) The introduction of bloodstained clothing was error where there was no proper foundation. Although the clothing was allegedly taken from the victim at a hospital, there was no testimony to that effect and no evidence to establish any chain of custody. Although the items were examined by an expert, he did not testify whether the blood type on the clothes was the same type as the victim's.

People v. Liapis, 3 Ill.App.3d 864, 279 N.E.2d 368 (1st Dist. 1972) At arson trial, testimony concerning an oil can was improper since there was no showing of a connection between the can or its contents and the fire.

People v. Tolefree, 9 Ill.App.3d 475, 292 N.E.2d 452 (1st Dist. 1972) In a burglary prosecution, precise identification of property taken is not required when the character of the property is such that exact identification is difficult.

People v. Frisco, 4 Ill.App.3d 1034, 283 N.E.2d 277 (1st Dist. 1972) The use of a model is proper to show a particular situation, to explain the testimony of a witness and to enable the jury to apply the testimony more intelligently to the facts.

Smith v. Ohio Oil Co., 10 Ill.App.2d 67, 134 N.E.2d 526 (4th Dist. 1956) Physical or real evidence refers to some object which had a direct part in the incident in question. Demonstrative evidence refers to evidence that has no probative value in itself and played no part in the incident, but is used as a visual aid to the trier of fact in understanding the testimony of witnesses. Such evidence includes models, charts, and drawings.

§19-6
Re-opening Evidence, Rebuttal, Surrebuttal

Illinois Supreme Court
People v. Ward, 2011 IL 108690 The circuit court admitted evidence of defendant's commission of a separate sex offense as propensity evidence pursuant to §115-7.3, but barred the admission of evidence that defendant had been acquitted of that offense. Applying the balancing test of §115-7.3(c), the Illinois Supreme Court concluded that it was error to bar the acquittal evidence.

The similarities between the two crimes greatly enhanced the probative value of the other-crime evidence. Excluding evidence that defendant had been acquitted of the other crime limited the jury's ability to assess the testimony of the other-crime complainant and may have enhanced her credibility because the jury did not hear all of the evidence leading to defendant's prior acquittal that could have affected the jurors' consideration of her credibility. The complete absence of any reference to the outcome in that case severely restricted defendant's ability to provide context for her allegations. The highly inflammatory

nature of those allegations and the grave danger of excessive sympathy for the alleged victim added to defendant's need to counter the impact of that evidence with the acquittal evidence.

There was also a readily apparent potential for unfair prejudice to the defendant from the other-crime complainant's detailed testimony, followed by her statement that she had previously testified in another case. Given the graphic nature of her depiction of the attack, the jury would naturally assume that the State had pressed charges against the defendant, and the jury would be left to speculate whether those charges were ongoing or had been resolved. Evidence that defendant had been acquitted of that assault would put to rest that speculation.

People v. Waller, 67 Ill.2d 381, 367 N.E.2d 1283 (1977) The trial court did not err by allowing certain testimony as rebuttal although it would have been admissible in the State's case in chief. The order of proof is subject to the broad discretion of the trial court, which did not abuse its discretion.

People v. Daugherty, 43 Ill.2d 251, 253 N.E.2d 389 (1969) Rebuttal evidence is that which explains, repels, contradicts or disproves the evidence of the opposing party. See also, **People v. Rios**, 145 Ill.App.3d 571, 495 N.E.2d 1103 (1st Dist. 1986) (the decision to admit rebuttal testimony is within the sound discretion of the trial judge).

People v. Cross, 40 Ill.2d 85, 237 N.E.2d 437 (1968) It is within the sound discretion of the trial court whether a case may be reopened. There was no abuse of discretion in allowing State to reopen its case to prove corporate ownership at a burglary trial; only a formal matter was involved, and the defense was not surprised. See also, **People v. Harris**, 74 Ill.2d 472, 386 N.E.2d 60 (1979) (it is within the sound discretion of the trial court to permit the recall of witnesses).

Illinois Appellate Court

People v. Evans, 2017 IL App (1st) 150091 A trial court may aid in bringing out the truth in a fair and impartial manner. A court does not assume the role of a prosecutor by suggesting that the State present evidence proving essential elements of an offense. Courts may permit the State to reopen its case to present additional evidence and may reopen a case on its own motion where there is a sound basis for doing so.

Here, after the State had rested its case in rebuttal during a bench trial, the trial court stated that it wanted to see the wallet that had been recovered from defendant. The court continued the case until the next day and the State introduced the wallet which contained evidence incriminating defendant.

The Appellate Court held that the trial court did not abandon its role as a neutral magistrate and assume the role of a prosecutor by asking the State to present corroborating evidence after the State had rested its case. The court's request to see the wallet was not an extraordinary course of action and it was done in a fair and impartial manner. Since this was a bench trial, the court possessed a wide latitude in relation to its fact-finding role and it did not assume the role of a prosecutor by asking to see the wallet.

People v. Gonzalez-Carrera, 2014 IL App (2d) 130968 The court has discretion to allow a litigant to reopen its case. The court's ruling on a motion to reopen the evidence will be reversed only if there is a clear showing of abuse of discretion. Factors to be considered in determining whether to reopen a case include whether the failure to introduce the evidence

was inadvertent, whether the opposing party is surprised or unfairly prejudiced, the importance of the new evidence, and whether cogent reasons justified denying the motion to reopen. The trial court may permit the proofs to be reopened after it has ruled on a motion to suppress, but also retains discretion to deny a motion to reopen that is filed after a ruling has been issued.

The trial court did not abuse its discretion by denying leave to the State to reopen the proofs where, after the trial court had ruled on the motion to suppress, the State sought to reopen the evidence to present an entirely new theory on the validity of a traffic stop. Generally, motions to reopen the evidence concern the theory which was previously argued, not a completely new theory of the case.

Furthermore, the State's attempt to reopen the evidence suggested that the officer in question had been "less than truthful" when he testified that he made the stop because there was a hole in the tail light cover on defendant's vehicle. In its motion to reopen the proofs, the State claimed that the officer knew at the time of the stop that defendant had just engaged in a drug transaction, but had been instructed by the Department of Homeland Security not to reveal that defendant was the subject of a drug investigation. The court stated:

Honesty and candor between law enforcement officers and prosecutors is essential to the fair administration of justice. If an ongoing investigation is in jeopardy of being derailed because of an ongoing prosecution, there are legal options available to postpone the disclosure, so long as the defendant's rights are not compromised. In short, lying under oath is never an option.

The order granting defendant's motion to suppress was affirmed.

People v. Goff, 299 Ill.App.3d 944, 702 N.E.2d 299 (1st Dist. 1998) The trial judge erred by refusing to reopen evidence to hear the testimony of an eyewitness who had been listed as a potential witness by both parties and who would have testified that: (1) the defendant did not commit the crimes, and (2) he did not see the State's primary witness at the scene. Although it is within the trial court's discretion to determine whether to grant a motion to reopen the proofs, the court should exclude defense testimony only in the most extreme circumstances. "Society's interest in the efficient administration of justice has to be balanced with a defendant's constitutional right to a fair opportunity to defend."

Where the testimony was material and might well have affected the outcome of the case, the witness was in court and ready to testify, and the prosecution would not have been unfairly surprised, exclusion of the exculpatory testimony could not be justified.

People v. Jose, 241 Ill.App.3d 104, 608 N.E.2d 667 (5th Dist. 1993) The trial court did not abuse its discretion by refusing to reconsider its ruling on a motion to suppress or reopen the evidence. The State did not seek to reopen the evidence until after it received an adverse ruling, the evidence had been available at all times, and the State offered no explanation for its actions other than "oversight" or lack of diligence. "We do not think the State can, through neglect or lack of diligence, fail to produce evidence which it contends supports its case and then, after receiving an adverse ruling, seek to introduce that evidence and have the court reconsider its ruling."

People v. Perez, 209 Ill.App.3d 457, 568 N.E.2d 250 (1st Dist. 1991) The trial judge erred by refusing to allow defendant to call a surrebuttal witness to impeach an informant. Because the State introduced new evidence in rebuttal, defendant was entitled to present a witness who would have rebutted the new evidence. See also, **People v. White**, 14 Ill.App.3d 1079,

303 N.E.2d 36 (3d Dist. 1973) (the failure to grant defendant the opportunity for surrebuttal was reversible error).

People v. Zambrano, 188 Ill.App.3d 432, 544 N.E.2d 964 (1st Dist. 1989) The trial judge did not abuse discretion by refusing to allow defendant to reopen his case and call a certain witness - defendant had not exercised due diligence by contacting the witness earlier, and the testimony would not have changed the outcome.

People v. Williams, 180 Ill.App.3d 294, 535 N.E.2d 993 (1st Dist. 1989) The trial judge did not abuse discretion by denying defendant's request to testify in surrebuttal. In rebuttal, State witnesses contradicted the defendant's testimony. The defendant then wished to testify in surrebuttal to deny what the rebuttal witnesses had said. Since the defendant would not have testified as to any new matter, surrebuttal was not warranted.

People v. Gardner, 47 Ill.App.3d 529, 362 N.E.2d 14 (5th Dist. 1977) Rebuttal evidence is that which explains, repels, contradicts or disproves evidence presented by the defendant. A rebuttal witness may be called to contradict the defendant's testimony as to a material issue, but not as to a collateral or immaterial matter. See also, **People v. Allen**, 27 Ill.App.3d 1054, 327 N.E.2d 387 (1st Dist. 1975) (same); **People v. McGhee**, 20 Ill.App.3d 915, 314 N.E.2d 313 (1st Dist. 1974) (rebuttal testimony concerning defendants' conduct while in lockup was improper because it was collateral to substantive issues; defendant was prejudiced because trial judge's remark indicated he relied on the testimony).

§19-7
Objections and Offers of Proof

§19-7(a)
Objections

Illinois Supreme Court

People v. Williams, 139 Ill.2d 1, 563 N.E.2d 431 (1990) The failure to object to hearsay testimony allows such evidence to be considered by the trier of fact and given its natural probative effect.

People v. Young, 128 Ill.2d 1, 538 N.E.2d 461 (1989) In order to preserve for appeal an issue regarding the admission of evidence, a defendant is required to object during trial and raise the issue again in his post-trial motion.

People v. Boclair, 129 Ill.2d 458, 544 N.E.2d 715 (1989) A defendant was not required to move to suppress a statement which he contended was improperly admitted and which was neither an admission nor a confession. "A motion in limine or an objection at trial would have preserved the issue, provided that it was also raised in a post-trial motion."

People v. Eyler, 133 Ill.2d 173, 549 N.E.2d 268 (1989) An objection made on a specific ground waives all grounds not specified. See also, **People v. Enis**, 139 Ill.2d 264, 564 N.E.2d 1155 (1990) (same).

People v. Whitehead, 116 Ill.2d 425, 508 N.E.2d 687 (1987) No issue was presented concerning the propriety of the trial court's denial of an in limine motion to bar the State

from using certain statements in cross-examination, where the witnesses in question did not testify.

People v. Stewart, 104 Ill.2d 463, 473 N.E.2d 1227 (1984) Where defendant objected to a line of questioning on two grounds, he could not argue a third ground on appeal. See also, **People v. Soskins**, 128 Ill.App.3d 564, 470 N.E.2d 643 (2d Dist. 1984) (defendant could not claim on appeal that certain impeachment was not relevant where he did not object on relevancy grounds at trial).

People v. Carlson, 79 Ill.2d 564, 404 N.E.2d 233 (1980) The failure to object to the admission of evidence normally operates as a waiver of the right to raise the question on appeal. "If a timely objection is made at trial . . . the court can, by sustaining the objection or instructing the jury to disregard the answer or remark, usually correct the error."

People v. Flatt, 82 Ill.2d 250, 514 N.E.2d 509 (1980) *In limine* motions relate to evidentiary matters and may be used to seek a ruling before the issue arises in front of a jury. See also, **People v. Goodwin**, 69 Ill.App.3d 347, 387 N.E.2d 433 (3d Dist. 1979) (a party need not file a motion *in limine* as a condition precedent to objecting during trial).

People v. Waller, 67 Ill.2d 381, 367 N.E.2d 1283 (1977) When the trial court admits evidence but reserves a ruling on its admissibility, the objecting party must insist on a subsequent ruling to avoid waiving the objection. See also, **People v. Neal**, 142 Ill.2d 140, 568 N.E.2d 808 (1990) ("[a]s we have recently noted, and hope to soon impress upon practitioners within this State, a movant has the responsibility to obtain a ruling on his motion if he wishes to raise a question pertaining thereto on appeal").

People v. Killebrew, 55 Ill.2d 337, 303 N.E.2d 377 (1973) Objection for lack of foundation waived contention on appeal that photographs were suggestive and prejudicial.

People v. Burage, 23 Ill.2d 280, 178 N.E.2d 389 (1961) An objection should be made when the evidence is being offered or as soon as the ground for the objection becomes apparent.

People v. Henry, 3 Ill.2d 609, 122 N.E.2d 159 (1954) A trial judge is not required to exclude improper evidence when there is no objection.

Johnson v. Bennett, 395 Ill. 389, 69 N.E.2d 899 (1946) A general objection, such as "I object," only questions the relevancy of the evidence. See also, **Forrest v. Industrial Commission**, 77 Ill.2d 86, 395 N.E.2d 576 (1979) (the word "incompetent," as applied to evidence, means no more than that it is inadmissible, and does not state a ground of objection).

Illinois Appellate Court

People v. Harris, 2014 IL App (2d) 120990 To preserve an issue for appellate review, defendant must object at trial and include the issue in a post-trial motion. Under Illinois Rule of Evidence 103(a)(1), to properly object to the admission of evidence, a party must state the specific ground for the objection unless the specific ground is apparent from the record.

Here, the record showed that the specific grounds for defendant's objection (to the admission of a logbook showing that a Breathalyzer machine had been certified as accurate)

was apparent from the context of the proceedings. When the State first attempted to enter the logbook into evidence, defense counsel objected on hearsay grounds. (A logbook is hearsay and thus would be admissible only where the State lays a proper foundation for its admission as an exception to the hearsay rule.) The court sustained the hearsay objection and the State attempted to lay a proper foundation.

Counsel again objected on the grounds that the logbook was not a business record. The court overruled this objection. Counsel continued to object to testimony about the logbook and the accuracy of the Breathalyzer, objections which the trial court characterized as a "continuing objection to the admissibility" of the logbook. In the post-trial motion, counsel preserved all objections made during trial, and during the hearing on the motion, counsel stated that the State did not lay a proper foundation.

Although counsel may not have specifically stated during trial or in the post-trial motion that she was objecting to the lack of a proper foundation, that ground was apparent from the context of the proceedings. And both the State and the trial court understood the nature of the objection. Defendant thus did not forfeit the issue.

People v. Sims, 2014 IL App (4th) 130568 The lack of a foundational objection does not relieve the State from its duty to satisfy the reasonable doubt standard, because testimony might be so weak in its foundation that it is incapable of satisfying the reasonable doubt standard. Generally, however, the lack of a foundational objection means that the evidence becomes part of the record and may be given whatever weight it is worth.

People v. Dunum, 182 Ill.App.3d 92, 537 N.E.2d 898 (1st Dist. 1989) Trial courts "are expected to guard against unduly restricting a defendant's case in granting a motion **in limine** brought by the State." Here, however, granting the State's **in limine** motion was not an abuse of discretion because the material in question was inadmissible.

People v. Escobar, 168 Ill.App.3d 30, 522 N.E.2d 191 (1st Dist. 1988) A trial judge generally has discretion to reserve ruling on evidentiary matters until they are presented at trial. The trial court did not abuse its discretion in denying defendant's in limine motion to preclude any reference to a polygraph test, as it was within the judge's discretion "to deny the motion and rule on the matter only if presented at trial." But see, **People v. Patrick & Phillips**, 233 Ill.2d 62, 908 N.E.2d 1 (2009) (in most circumstances, it is an abuse of discretion to reserve ruling on a motion to exclude defendant's prior convictions as impeachment until after the defendant testifies).

People v. Dandridge, 98 Ill.App.3d 1021, 424 N.E.2d 1262 (5th Dist. 1981) Defense counsel's objection to the prosecutor's use of hearsay testimony as substantive evidence during closing argument was properly overruled; counsel did not object or seek to limit the use of the testimony when it was introduced, but objected for the first time during closing argument.

People v. Strater, 72 Ill.App.3d 486, 390 N.E.2d 979 (4th Dist. 1979) A party cannot object to improper evidence which he himself admitted to evidence. But see, People v. Rose, 77 Ill.App.3d 330, 395 N.E.2d 1081 (1st Dist. 1979) (party may properly object to an answer elicited during its own examination of a witness when the answer is not responsive).

People v. Garner, 91 Ill.App.2d 7, 234 N.E.2d 39 (2d Dist. 1968) Objections to the admission of evidence must be specific enough to inform the court and the opponent of the ground or reason for the objection.

§19-7(b)
Offers of Proof

Illinois Supreme Court
People v. Staake, 2017 IL 121755 In order to raise an issue on appeal concerning the exclusion of evidence, defendant must make an adequate offer of proof in the trial court. The failure to make such an offer results in forfeiture of the issue.

The court held that the same rule applies where the trial court held that unless counsel presented a proffer of the supporting evidence, the defense would be barred from arguing that the cause of death was the decedent's refusal to accept medical treatment. In the absence of an offer of proof or a proffer, the issue was forfeited.

People v. Patterson, 2014 IL 115102 To preserve an appellate claim concerning the denial of a request to admit evidence, a party is required to make a detailed and specific offer of proof if the record would otherwise be unclear.

In defendant's trial for aggravated criminal sexual assault, complainant testified that defendant forced her to have vaginal intercourse, while defendant claimed there had been no intercourse. The treating physician, a State's witness, testified that complainant had some cervical redness consistent with sexual intercourse.

Defendant attempted to introduce evidence that sperm (which did not belong to defendant) was found in complainant's vagina to show that she had engaged in sexual intercourse with someone other than defendant in the days prior to the assault. Defendant argued that although such evidence would normally be barred by the rape shield statute, he had a constitutional right to introduce such evidence to refute the inference that complainant had recent sexual intercourse with defendant.

The court held that defendant failed to provide an adequate offer of proof to create an appealable issue. The sole support for the proffered evidence was counsel's speculation that complainant's cervical inflammation occurred three days before the alleged assault because sperm could persist for 72 hours. Counsel offered no medical testimony to support his bare assertion about the longevity of sperm or about the general persistence of cervical inflamation. The court rejected defendant's reliance on medical sources cited in the State's appellate brief indicating cervical inflammation can last three days. It was trial counsel's burden to provide a sufficiently detailed offer of proof at trial, not months or years later on appeal. When evaluating an evidentiary ruling for abuse of discretion, the reviewing court must evaluate that discretion in light of evidence actually before the trial judge.

People v. Thompkins, 181 Ill.2d 1, 690 N.E.2d 984 (1998) The trial judge erred by refusing to allow defendant to make offers of proof, by leaving the bench during an offer of proof that was allowed, and by ordering defendant's attempted offers of proof stricken from the record. The trial court is required to permit counsel to make offers of proof; by refusing to hear defendant's offers of proof, the trial court denied itself information required to make an informed exercise of discretion and denied the Supreme Court a proper record on which to review rulings.

People v. Andrews, 146 Ill.2d 413, 588 N.E.2d 1126 (1992) An issue concerning the admissibility of evidence is preserved for review only if there is an adequate offer of proof. An

offer of proof is intended to disclose to the trial judge and opposing counsel the nature of the evidence, and to enable a reviewing court to determine whether its exclusion was proper. "[C]ounsel must explicitly state what the excluded testimony would reveal"; an offer is inadequate if it merely summarizes testimony in a conclusory manner, contains the "unsupported speculation of counsel as to what the witness would say," or "merely alludes to what might be divulged by the testimony." See also, **People v. Richmond**, 201 Ill.App.3d 130, 559 N.E.2d 302 (4th Dist. 1990) (a refusal to allow an offer of proof is not error if the suggested testimony is irrelevant).

People v. Sanchez, 131 Ill.2d 417, 546 N.E.2d 574 (1989) An offer of proof serves two functions: (1) to inform the trial judge and the opposing party of the nature and substance of the evidence expected to be introduced, and (2) to preserve the issue for appeal. The party making an offer of proof has the burden to show the relevance, materiality and competency of the tendered evidence.

People v. Lynch, 104 Ill.2d 194, 470 N.E.2d 1018 (1984) If a question shows the purpose and materiality of the evidence, is in proper form and clearly admits of a favorable answer, the proponent need not make a formal offer of what the answer would be, unless the trial court asks for one. See also, **People v. Robinson**, 56 Ill.App.3d 832, 371 N.E.2d 1170 (5th Dist. 1977) (where a witness's testimony or the basis for it is unclear, a detailed and specific offer of proof is required).

Illinois Appellate Court

People v. Wills, 2017 IL App (2d) 150240 Where a defendant asserts that the trial court improperly excluded evidence at trial, he must make an offer of proof as to what the excluded evidence would have been in order to provide a complete record for review. The offer of proof does not have to include formal, sworn testimony, but it must be specific and provide details of the evidence in question.

Here, defendant argued that the trial court improperly excluded, as hearsay, evidence of the content of an argument between defendant and the alleged victim, A.W. Defendant asserted that the evidence was not hearsay because it went directly to A.W.'s motive to lie. The Appellate Court agreed that it was error to exclude the evidence, but found that defendant's argument was constrained by the absence of an offer of proof. Without such an offer, the Appellate Court would not speculate that the excluded testimony would have included sufficient detail to have made any difference in the outcome.

In a special concurrence, Justice McLaren noted concern over protecting the anonymity of sexual abuse victims. Justice McLaren recognized that the current Supreme Court Rules do not allow use of initials in the caption of such cases and encouraged the adoption of such a rule or legislation, especially where the defendant and the victim share the same surname.

People v. Cerda, 2014 IL App (1st) 120484 The State argued that the trial court properly barred evidence since defendant failed to make an adequate offer of proof. The Rape Shield Statute provides that no evidence covered by the statute is admissible unless defendant makes an offer of proof at an *in camera* hearing. The purpose of the hearing is to determine whether defendant has evidence to impeach the witness if she denies prior sexual activity with defendant. 725 ILCS 5/115-7(b).

The court held that the hearing's purpose only applies to the first exception, and thus the statute is ambiguous as to whether it requires an offer of proof when the second exception

is at issue. Beyond the statutory requirement, however, when a trial court bars evidence, no appealable issue exists in the absence of an offer of proof. The purpose of an offer of proof is to: (1) disclose the evidence to the trial court so that it may take appropriate action; and (2) provide the appellate court with an adequate record to determine whether there was error. By failing to make an adequate offer of proof, a defendant forfeits any claims on appeal that the trial court barred him from presenting evidence necessary to prove his case.

Here, defense counsel made an offer of proof by reading from a police report stating that the victim "told her mom days before about having had sex for the first time with a boy her own age." The court held that this offer of proof provided no evidence that the victim's mother was angry about the consensual sexual experience and defendant only argued "weakly" that the mother "could have been" angry. As a result, the offer of proof did not support defendant's proposed argument that the victim's accusations were motivated by a desire to deflect her mother's anger about the sexual encounter. The trial court thus did not abuse its discretion in excluding the evidence.

People v. Shenault, 2014 IL App (2d) 130211 Defendant was charged with resisting or obstructing a peace officer by driving away from a traffic stop without authorization. Defendant claimed that she heard the officer say that "you" are free to go, and believed that his remark referred to her. The trial court sustained hearsay objections when the defense sought to elicit the officer's remarks from other witnesses.

The court concluded that in the absence of an offer of proof, it could not determine whether the testimony which defendant sought to elicit would have had any appreciable value to corroborate defendant's testimony or whether exclusion of the testimony caused prejudice.

The court also found that the failure to make an offer of proof cannot be evaluated under the plain error rule. The first step in applying the plain error doctrine is determining whether reversible error occurred. Where the issue is whether evidence was improperly excluded, the failure to make a proper offer of proof prevents the court from making such a determination.

People v. Pelo, 404 Ill.App.3d 839, 942 N.E.2d 463 (4th Dist. 2010) An issue regarding the admissibility of evidence is preserved for review only is there is an adequate offer of proof. A formal offer of proof is the traditional method of making an offer of proof. It consists of eliciting the testimony of the witness sought to be introduced outside the presence of the jury. An alternative method is an informal offer of proof made by counsel informing the court with particularity: (1) what the testimony will be; (2) by whom it will be presented; and (3) its purpose. An informal offer of proof is insufficient if it merely summarizes the testimony in a conclusory manner or offers unsupported speculation regarding what the testimony will be.

Any error in the exclusion of testimony of an expert was waived where counsel made no formal offer of proof after the court deemed counsel's informal offer insufficient to inform the court of the nature of the evidence sought to be introduced.

People v. Quinn, 332 Ill.App.3d 40, 772 N.E.2d 872 (1st Dist. 2002) Defendant did not waive the right to question whether the State should have been required to disclose the "exact surveillance location" in a controlled substance case. Although defendant failed to make an offer of proof, an offer is not required where: (1) it is apparent that the trial court clearly understood the nature and character of the evidence, or (2) the purpose and materiality of the evidence was clearly shown.

People v. Cobb, 186 Ill.App.3d 898, 542 N.E.2d 1171 (2d Dist. 1989) Defense counsel's informal offer of proof, which merely summarized the witness's testimony in a conclusory manner, was insufficient because it failed to show exactly what the substance of the testimony would be. See also, **People v. Duarte**, 79 Ill.App.3d 110, 398 N.E.2d 332 (1st Dist. 1979) (offer of proof by way of attorney's recitation of the testimony he expects to elicit should be used only when the witness is unavailable and the offer is sufficiently specific; because the expectations of the attorney and the testimony of the witness may be entirely different, the witness should be examined).

People v. McMullin, 138 Ill.App.3d 872, 486 N.E.2d 412 (2d Dist. 1985) Offer of proof was insufficient where defense counsel showed the subject of the excluded testimony (defendant's state of mind), but the offer of proof did not "show what the substance of that testimony would have been (i.e., what defendant would have said his state of mind was)."

People v. Husted, 97 Ill.App.3d 160, 422 N.E.2d 962 (2d Dist. 1981) An offer of proof is not required when the evidence sought to be admitted is obviously material and relevant.

People v. Mosley, 68 Ill.App.3d 721, 386 N.E.2d 545 (1st Dist. 1979) Offer of proof concerning the victim's alleged use of drugs was too vague where it failed to indicate how the defendant would show that the victim was under the influence of drugs at the time of the crime.

People v. Brown, 27 Ill.App.3d 569, 327 N.E.2d 51 (2d Dist. 1975) Offer of proof was sufficient since it demonstrated the nature of the evidence defense counsel was attempting to elicit.

People v. Camel, 10 Ill.App.3d 1022, 295 N.E.2d 270 (4th Dist. 1973) (aff'd 59 Ill.2d 422, 322 N.E.2d 36 (1974)) The right to make an offer of proof is almost absolute, subject only to the court's discretion to reasonably restrict repetitious efforts to offer the same or substantially the same type of proof as has been previously offered and denied.

People v. Miller, 55 Ill.App.3d 136, 370 N.E.2d 639 (3d Dist. 1971) When the trial judge sustains the State's objection to the admission of certain evidence, the defendant cannot properly allege on appeal a theory of admissibility which is different from the theory argued at trial.

§19-8
Evidence of Character

§19-8(a)
Generally

Illinois Supreme Court

People v. Moretti, 6 Ill.2d 494, 129 N.E.2d 709 (1955) Reputation witnesses must be shown to have adequate knowledge of the person in question. Evidence of reputation must be based on contact with the subject's neighbors and associates, rather than on the personal opinion of the witness.

People v. Hermens, 5 Ill.2d 277, 125 N.E.2d 500 (1955) A witness who testifies concerning a person's good reputation may not be cross-examined about his knowledge of particular acts of misconduct by that person.

People v. Willy, 301 Ill. 307, 133 N.E. 859 (1921) Evidence of character is confined to proof of general reputation at or prior to the alleged offense, and should be limited to a time not very remote from the date of the alleged offense. The personal opinions of witnesses and evidence of specific acts are improper.

Reputation testimony may not be based upon specific acts of either bad or good conduct.

Illinois Appellate Court

People v. Keller, 267 Ill.App.3d 602, 641 N.E.2d 891 (1st Dist. 1994) Noting a conflict in authority, the court concluded that habit and custom evidence is admissible if a sufficient foundation is established. The Court declined to decide whether habit and custom evidence is admissible where direct testimony about the offense is available.

People v. Dorn, 46 Ill.App.3d 820, 361 N.E.2d 353 (3d Dist. 1977) General reputation is not established by the personal knowledge of the witness, but by what people in the community, as a whole, think of the person. For that reason, it is improper to cross-examine a character witness as to the witness's own knowledge of particular acts of misconduct on the part of the person whose character is in question. Instead, cross-examination is limited to disparaging rumors and conversations which the witness has heard in the community.

§19-8(b)
Defendant's Character

Illinois Supreme Court

People v. Redmond, 50 Ill.2d 313, 278 N.E.2d 766 (1972) The defendant may not introduce evidence of a character trait which has no bearing on the commission of the crime charged. See also, **People v. Griffith**, 56 Ill.App.3d 747, 372 N.E.2d 404 (2d Dist. 1978) (defendant's reputation for truth and veracity was not admissible at his trial for reckless homicide); **People v. House**, 197 Ill.App.3d 1017, 557 N.E.2d 270 (1st Dist. 1990) (reckless homicide); **People v. Colclasure**, 200 Ill.App.3d 1038, 558 N.E.2d 705 (5th Dist. 1990) (murder).

People v. Shockey, 30 Ill.2d 147, 195 N.E.2d 703 (1964) Evidence of defendant's reputation for honesty and integrity was admissible at his trial for theft. See also, **People v. Wells**, 80 Ill.App.2d 187, 224 N.E.2d 288 (5th Dist. 1967) (evidence of defendant's reputation for peacefulness is admissible in disorderly conduct case); **People v. Thornton**, 61 Ill.App.3d 530, 378 N.E.2d 198 (5th Dist. 1978) (evidence of defendant's reputation for nonviolence is admissible at his trial for armed robbery). Compare, **People v. Crosser**, 117 Ill.App.3d 24, 452 N.E.2d 857 (2d Dist. 1983) (defendant's reputation for truth and veracity was not relevant at his trial for aggravated battery).

People v. Lewis, 25 Ill.2d 442, 185 N.E.2d 254 (1962) The defendant may present evidence of his good character as inconsistent with the commission of the crime charged. The State may not present evidence of the defendant's bad character until defendant puts his character in issue by presenting evidence of good character. See also, **People v. Lucas**, 151 Ill.2d 460,

603 N.E.2d 460 (1992) (error to admit evidence of defendant's gang association where defendant did not place his good character in issue).

Illinois Appellate Court

People v. Cervantes, 2014 IL App (3d) 120745 When a defendant raises a theory of self-defense, the victim's violent character is relevant to the issue of which party was the initial aggressor. But evidence of defendant's violent character is admissible only when the defendant puts his own character at issue by introducing evidence that he is peaceful. **People v. Devine**, 199 Ill. App. 3d 1032 (3rd. Dist. 1990); **People v. Harris**, 224 Ill. App. 3d 649 (3rd. Dist. 1992).

In his jury trial for first degree murder, defendant raised self-defense and argued that the victim was the initial aggressor. To support his defense, he introduced evidence that the victim had a violent character. In rebuttal, the State was allowed to introduce three prior convictions of defendant for crimes of violence.

The Appellate Court held that the introduction of the prior crimes evidence was improper. The defense strategy focused on the victim's violent character but did not attempt to prove defendant's peaceful character. Accordingly, defendant's prior convictions were not admissible. The court specifically rejected the State's argument that when a defendant remains silent about his own character he is suggesting that he is peaceful. This argument ignores, and is contrary to, the presumption of innocence and the right to remain silent.

The erroneous admission of other crimes evidence creates a high risk of prejudice and ordinarily calls for reversal. Here the prejudice caused by the improper introduction of three prior convictions for violent crimes was magnified when the trial court gave an improper jury instruction that allowed the jury to consider as substantive evidence three other prior convictions that were properly admitted only to impeach defendant. Consequently, the Appellate Court reversed defendant's conviction and remanded for a new trial.

The dissenting justice would have held that **Devine** and **Harris** were wrongly decided and that the prior convictions were admissible. A defendant who raises an initial aggressor self-defense argument, but remains silent about his character at trial, necessarily suggests that he is peaceful. It would be "illogical and unfair" to allow defendant to introduce evidence of the victim's past violent acts but prevent the State from introducing similar evidence about the defendant.

People v. Mandarino, 2013 IL App (1st) 111772 Defendant, a former police officer, was prosecuted for aggravated battery after he beat a motorist with a collapsible baton during a traffic stop. On appeal, defendant argued that the trial erred by admitting lay opinion that defendant's use of force against the motorist was unreasonable and unnecessary.

The Appellate Court concluded that defendant forfeited the issue where he did not argue at trial or in the post-trial motion that the testimony was inadmissible lay opinion. Furthermore, even if lay opinion was improperly admitted, the plain error rule did not apply where the evidence was not closely balanced.

In the alternative, the lay opinion was admissible on two theories - to rebut character evidence and under the doctrine of curative admissibility.

1. The court concluded that the defense introduced character testimony by eliciting evidence of defendant's exceptional performance and service records. Character evidence is generally inadmissible in a criminal trial unless introduced by the defendant, in which case the State is permitted to respond by offering its own character evidence. (Illinois Rule of Evidence 404). Here, the State rebutted the defense evidence of the accused's good character

by showing that in light of the incident leading to the instant charges, the witness no longer viewed defendant as an excellent officer.

2. The evidence was also admissible under the curative admissibility doctrine, which allows the State to respond on redirect examination where the defendant has opened the door to a particular subject, even if the response elicits what would otherwise be inadmissible evidence. The purpose of the curative admissibility doctrine is to shield a party from unduly prejudicial inferences raised by the other side. Whether to allow curative evidence lies in the sound discretion of the trial court.

The court concluded that admitting the lay opinion of the witness, a deputy chief, "allowed the State to cure any impression . . . that [the witness] still regarded [defendant] to be an outstanding officer."

People v. Falls, 387 Ill.App.3d 533, 902 N.E.2d 120 (1st Dist. 2008) Once defendant's truthfulness had been attacked by the prosecutor in cross-examination, the trial judge erred by preventing defendant from introducing testimony of her reputation in the community for truthfulness. An attack on defendant's truthfulness entitles her to present witnesses who will testify to her reputation for truthfulness. See also, People v. Barnes, 182 Ill.App.3d 75, 537 N.E.2d 949 (1st Dist. 1989) (although it is generally improper for a defendant to introduce specific acts to show his good character, such evidence should have been allowed after the State erroneously introduced specific acts of bad character against him).

People v. Armstead, 322 Ill.App.3d 1, 748 N.E.2d 691 (1st Dist. 2001) The State erred by repeatedly cross-examining defendant about his cohabitation with a long-time girlfriend before his arrest and his marriage to a different woman shortly after his arrest. Because the "evidence is close and the State's case is weak," and because the repetitive questioning concerning defendant's alleged bad character could have affected the result of the trial, a new trial was required. See also, People v. Maounis, 309 Ill.App.3d 155, 722 N.E.2d 749 (1st Dist. 1999) (fact that defendant did not spend Christmas with his family was irrelevant to any issue).

People v. Harris, 224 Ill.App.3d 649, 587 N.E.2d 47 (3d Dist. 1992) Where self-defense is raised, prior convictions for crimes of violence are admissible only if the defendant introduces evidence of his good character to show that he is a peaceful person. Because defendant did not put his peaceful character into evidence, the State's use of his prior convictions was error.

The Court rejected the State's argument that defendant put his peaceful character in issue by claiming that he would not have hit the complainant had the complainant not swung first, or by rebutting the State's evidence that defendant's bar was a "rough and somewhat dangerous establishment." Furthermore, a defendant does not place his character in issue by responding to a question on cross-examination - the State cannot elicit testimony concerning character and then claim the right to offer rebuttal evidence.

People v. West, 246 Ill.App.3d 1070, 617 N.E.2d 147 (1st Dist. 1993) The prosecutor improperly questioned a character witness regarding her knowledge of particular acts of misconduct on the part of the defendant where he brought out evidence that the witness had previously accused defendant of assaulting her.

People v. Perez, 209 Ill.App.3d 457, 568 N.E.2d 250 (1st Dist. 1991) Where entrapment is raised, "a searching inquiry into the defendant's conduct and pre-disposition is . . . appropriate" because defendant's character is directly in issue. By not allowing defendant to

call character witnesses, the trial court "hampered his ability to present a defense of lack of predisposition."

People v. Flax, 147 Ill.App.3d 943, 498 N.E.2d 667 (1st Dist. 1986) Defendant's good character may not be shown by evidence that he has never been arrested, charged or convicted of a crime. Also, such evidence is not admissible to prove that defendant was not the aggressor.

People v. Chandler, 88 Ill.App.3d 644, 411 N.E.2d 283 (1st Dist. 1980) The character of the defendant may only be proved by evidence of general reputation; a witness's personal opinion of that reputation is not admissible.

People v. Carruthers, 18 Ill.App.3d 255, 309 N.E.2d 659 (1st Dist. 1974) Evidence of character must be confined to proof of general reputation at or before the commission of the offense - it is improper to admit evidence which covers an accused's reputation after the offense or what was said after the offense with reference to the accused's character either before or after the offense. But see, People v. Bascomb, 74 Ill.App.3d 392, 392 N.E.2d 1130 (4th Dist. 1979) (conversations which occurred after the alleged crime were inadmissible because they did not reveal an awareness of defendant's reputation at the critical times - at or prior to the alleged crime; however, character evidence should have been admitted where there was a sufficient basis for apart from those conversations).

§19-8(c)
Witness's Character

Illinois Supreme Court
People v. Kirchner, 194 Ill.2d 502, 743 N.E.2d 94 (2000) The trial judge did not err by denying a defense request to have a critical State's witness submit to a psychological and psychiatric evaluation. Because the witness's mental health treatment records were provided to the judge in camera, defendant was allowed to use eight documents as impeachment, and the witness testified concerning his history of substance abuse, mental illness, and memory problems, the refusal to order a psychological and psychiatric examination did not constitute an abuse of discretion or cause manifest prejudice.

People v. West, 158 Ill.2d 155, 632 N.E.2d 1004 (1994) The Supreme Court rejected the argument that where a witness is too young to have developed a reputation for truthfulness, credibility may be challenged by opinion evidence and specific acts of untruthfulness. The Court held that the only proper method for impeaching a witness's reputation for truthfulness is by introducing reputation evidence.

People v. Nash, 36 Ill.2d 275, 222 N.E.2d 473 (1966) Whenever a person (including the defendant) testifies, that person's credibility is in issue. Thus, the opposing party may present evidence of that person's bad reputation for truth and veracity.

Illinois Appellate Court
People v. Burgund, 2016 IL App (5th) 130119 Defendant was convicted of predatory criminal sexual assault of his two children. The State's case consisted of his confession and the testimony of his estranged wife and mother-in-law. The trial court excluded several key pieces of evidence defendant wanted to introduce to show that his confession was false and

the testimony of his wife and mother-in-law was not believable. The trial court excluded as hearsay the testimony of two witnesses who would have corroborated defendant's testimony that his wife claimed to have a supernatural power of discernment and was obsessed with making false accusations of lustful behavior. The court also excluded as hearsay the testimony of a witness who dated defendant's wife before she married defendant and would have described numerous instances where the wife accused the witness of being immoral and lustful.

Illinois Rule of Evidence 801 defines hearsay as an out of court statement offered to prove the truth of the mater asserted. Ill. R. Evid. 801(c). An out of court statement is not hearsay if it is offered merely to show that the statement was made, not that it was true.

The Appellate Court held that the testimony was not offered to prove the truth of the matters asserted in the out of court statements made by defendant's wife. Defendant was not trying to prove that his wife actually had a supernatural power of discernment or that one of the witnesses actually had a problem with immoral and lustful behavior. Defendant instead offered the testimony only to prove that his wife had made the statements. Since the statements supported his defense that his wife treated defendant in a similar manner, the trial court erred in precluding this testimony.

The trial court also excluded the testimony of the ex-husband of defendant's mother-in-law. He would have testified that defendant's wife falsely told people that the ex-husband had sexually abused the mother-in-law. Defendant wanted to introduce this evidence to show that his wife would fabricate sexual abuse allegations to gain sympathy and acceptance within their church community.

Illinois law generally prohibits the impeachment of a witness with specific past instances of untruthfulness. But such evidence may be used to impeach a witness if the past act shows bias, interest, or motive to testify falsely.

The Appellate Court held that this evidence was admissible to show the wife's potential motive, interest, and bias in testifying against defendant. The trial evidence showed that defendant's marriage was tumultuous, with accusations that defendant had lust issues, physical violence stemming from those accusations, and discussions of divorce. Evidence that the wife had made false accusations in the past to gain acceptance in her church as it related to divorce was relevant to show that she may have believed that she would personally benefit again from making false accusations against defendant.

The court granted defendant a new trial.

People v. Brink, 294 Ill.App.3d 295, 690 N.E.2d 136 (4th Dist. 1998) To elicit testimony concerning another witness's reputation for truth and veracity, the proponent should first ask whether the witness knows the general reputation for truthfulness in the community. Where the witness's opinion was based solely on her personal experience and not on reputation, the testimony was inadmissible.

People v. House, 197 Ill.App.3d 1017, 557 N.E.2d 270 (1st Dist. 1990) Defendant could not introduce evidence regarding his reputation for truth and veracity merely because the State presented evidence inconsistent with defendant's testimony and the prosecutor argued that the State's evidence should be believed. The State never directly attacked the veracity of defendant's testimony; the fact that defendant's testimony regarding the alleged offense "differed from the testimony presented by the State's witnesses did not, in and of itself, justify reception into evidence of testimony regarding defendant's reputation for truth and veracity."

People v. Paull, 176 Ill.App.3d 960, 531 N.E.2d 1008 (1st Dist. 1988) Cross-examination which portrayed a defense witness "as a generally immoral person" was improper; the prosecutor asked whether the witness was a stripper, had worked in a lounge, had worked in a theater where pornographic movies were shown, and drank.

People v. Bramlett, 131 Ill.App.3d 616, 476 N.E.2d 44 (5th Dist. 1985) Because the credibility of a character witness is in issue, evidence of the character witness's bad reputation for truth and veracity is admissible.

People v. Roberts, 133 Ill.App.3d 731, 479 N.E.2d 386 (5th Dist. 1985) A defense character witness may not be cross-examined concerning his knowledge of the defendant's prior arrests.

People v. Doll, 126 Ill.App.3d 495, 467 N.E.2d 335 (2d Dist. 1984) Evidence of a witness's good reputation for truth and veracity is admissible only if the credibility of the witness has been attacked on that issue. The defense could not introduce evidence supporting its own witness's credibility until after the witness's credibility had been attacked by the State.

People v. Garza, 92 Ill.App.3d 723, 415 N.E.2d 1328 (3d Dist. 1981) It is improper to impeach a witness's credibility by showing that on a prior occasion he or she lied about an unrelated matter.

People v. Griffith, 56 Ill.App.3d 747, 372 N.E.2d 404 (2d Dist. 1978) When a defendant testifies, the State may impeach him by evidence of his bad reputation for truthfulness. After the State presents such evidence, the defendant may present evidence of his good reputation for truthfulness.

§19-8(d)
Complainant's Character

Illinois Supreme Court
People v. Morgan, 197 Ill.2d 404, 758 N.E.2d 813 (2001) Where self-defense is raised, the victim's violent and aggressive character is relevant to the question of which party was the aggressor. In such cases, the defense has the right to introduce the victim's "character for violence" to illustrate the circumstances which confronted the defendant, the extent of the danger he faced, and his motive.

Where the defendant was allowed to testify that the decedents (defendant's grandparents) were aggressive and violent, and that his knowledge of their character affected his perceptions and reactions on the day of the offense, the trial judge did not abuse his discretion by excluding evidence that the decedents had abused defendant's mother during her childhood. Because there was nothing to indicate that defendant was aware of how his mother had been treated, the evidence had no relevance to defendant's perceptions at the time of the offense. In addition, in the absence of conflicting versions of the offense, testimony that the mother had been mistreated as a child was inadmissible to corroborate defendant's version of events.

People v. Whiters, 146 Ill.2d 437, 588 N.E.2d 1172 (1992) Where the defense attacked the decedent's good character in opening argument and stated an intent to show his violent nature, the State was entitled to present evidence of the decedent's good character and

reputation though the defense did not introduce any evidence of Barker's poor character. "To hold otherwise would enable the defendant to get away with using her opening statement to vilify the victim's character and thus poison the water without offering any supporting evidence."

People v. Lynch, 104 Ill.2d 194, 470 N.E.2d 1018 (1984) When the theory of self-defense is raised, the victim's aggressive and violent character is relevant to show which party was the aggressor. Evidence of a victim's aggressive and violent character may tend to support a theory of self-defense in two ways: (1) the defendant's knowledge of the victim's violent tendencies necessarily affects his perceptions of and reactions to the victim's behavior, and (2) evidence of the victim's propensity for violence tends to support the defendant's version of the facts where there are conflicting accounts of what happened.

Thus, the trial court erred by refusing to admit evidence that the decedent had three battery convictions even where the defendant was unaware of those convictions at the time of the offense.

People v. Stombaugh, 52 Ill.2d 130, 284 N.E.2d 640 (1972) In a homicide case in which self-defense is raised and evidence has been introduced from which the jury could believe that deceased was the assailant, evidence concerning the violent temper and disposition of the deceased, and his prior threats to the defendant, is admissible.

Illinois Appellate Court

People v. Degrave, 2023 IL App (1st) 192479 When a defendant claims self-defense, evidence of a victim's violent and aggressive character may be relevant to show who was the initial aggressor. Under **People v. Lynch**, 104 Ill. 2d 194 (1984), such evidence is admissible for one of two reasons: (1) to explain the defendant's perceptions of the victim's behavior and the reasonableness of his response, or (2) to support the defendant's version of the facts when there are conflicting accounts of what occurred. This second reason is an exception to the general prohibition on propensity evidence. The **Lynch** rule has been codified in Illinois Rule of Evidence 405.

Here, defendant sought to admit testimony and a video regarding a fight between himself and the complainant, his wife, which occurred approximately a month *after* the alleged incident of domestic violence charged in this case. The trial court abused its discretion when it refused to admit the evidence.

The evidence was not admissible for the first reason discussed in **Lynch**. It could not have affected defendant's state of mind at the time of the charged offense because the subsequent incident had not yet occurred. But, evidence of the subsequent incident was relevant and admissible under the second basis identified in **Lynch**. Evidence of the subsequent fight – where defendant's wife was the aggressor and behaved violently toward defendant – was relevant to a determination of what happened during the charged incident given that defendant and his wife had provided conflicting versions of events. While Rule 405(b)(2) references "specific instances of the alleged victim's prior violent conduct," the appellate court held that limiting such evidence to prior incidents would be inconsistent with the spirit of **Lynch**. Further, there is no reason to impose a timing element on character evidence. One's character is revealed by one's actions, regardless of the timing of the acts in question.

The court's error in refusing to admit evidence of the subsequent incident was first-prong plain error. At trial, both defendant and the complainant testified to plausible versions

of the incident. And, each had a motive to testify falsely – defendant to avoid conviction and the complainant to protect her immigration status. While the complainant had facial injuries consistent with her account of the incident, those injuries were also consistent with defendant's claim of self-defense. Under these circumstances, the evidence was closely balanced, and evidence of the subsequent incident could have affected the outcome. The matter was reversed and remanded for a new trial.

People v. Martinez, 2021 IL App (1st) 182553 Defendant alleged self-defense at his murder trial. Pursuant to **Lynch,** he sought the admission of the decedent's robbery conviction, which occurred approximately 10 years prior to the instant shooting, and decedent's 2012 conviction for aggravated battery to a peace officer. The trial court allowed the 2012 conviction but disallowed the 2006 conviction, finding it too remote in time.

Generally, the trial court has discretion to exclude evidence of a conviction which is 10 or more years old. Here, the crime was approximately 10 years prior to the shooting, and thus the Appellate Court would not find an abuse of discretion. Regardless, any error was harmless because the jury heard evidence of decedent's violent and aggressive character, specifically that he was convicted in 2012 of aggravated battery of a peace officer, including testimony from the police officers involved in that altercation.

People v. Cruz, 2021 IL App (1st) 190132 The Appellate Court affirmed defendant's aggravated battery conviction, rejecting his self-defense claim by finding he was the initial aggressor. Although the complainant punched defendant in the face several times before defendant stabbed him, the blows were preceded by aggressive acts by the defendant: threatening to fight the complainant, brandishing the knife, and approaching complainant as he stood on a city bus. These acts were sufficient to prove initial aggression.

An argument may have been made that the roles had reversed at the time of the punches, such that complainant took on the role of aggressor and defendant acted reasonably by stabbing the complainant to avoid serious bodily injury. But defendant did not pursue the argument or cite the necessary authority on appeal.

Finally, while counsel acted unreasonably in failing to request a **Lynch** instruction, IPI 3.12X, so that the jury could consider the complainant's prior assault conviction as propensity evidence for purposes of evaluating defendant's claim of self-defense, the Appellate Court did not find sufficient prejudice to justify a new trial. After all, the complainant in this case did initiate the first physical contact, and the only question was whether defendant's actions leading up to this contact constituted initial aggression. The complainant's propensity for assault did not bear on this aspect of the case.

People v. Williams, 2020 IL App (1st) 162512 In a murder case, defendant alleged self-defense and cited the complainant's anger at defendant for his response to a family sexual abuse issue involving the decedent and defendant's sister. The trial court did not abuse its discretion in denying defendant's request to call his sister to testify about the abuse. The trial court conducted a reasonable balancing test by allowing the defendant to testify about the abuse, which was 20 years old by the time of the offense, while at the same time avoiding a "mini-trial" about the conduct.

People v. Martinez, 2019 IL App (2d) 170793 Before her trial for battery, defendant moved to admit the complainant's 55-year-old conviction for aggravated battery under **Lynch**. The trial court found the conviction too remote in time, and held it was more prejudicial than probative under Rule 403. On appeal, defendant argued that the court erred in applying Rule

403 to **Lynch** evidence. The Appellate Court disagreed, finding the Rule 403 balancing test is applicable to all relevant evidence, and nothing in **Lynch** or its progeny precludes a trial court from considering prejudice to the State.

People v. Martinez, 2019 IL App (2d) 170793 Before her trial for battery, defendant moved to admit the complainant's 55-year-old conviction for aggravated battery under Lynch. The trial court found the conviction too remote in time, and held it was more prejudicial than probative under Rule 403. On appeal, defendant argued that the court erred in applying Rule 403 to Lynch evidence. The Appellate Court disagreed, finding the Rule 403 balancing test is applicable to all relevant evidence, and nothing in Lynch or its progeny precludes a trial court from considering prejudice to the State.

The State improperly bolstered the credibility of the complainant in a sexual assault case by asking an outcry witness whether the complainant had ever not told her the truth. A witness may express an opinion about another witness's character for truthfulness only after that character has been attacked by reputation or opinion evidence.

The State erred when it asked defendant why his daughter would falsely accuse him of sexual assault. It is improper for a prosecutor to ask a defendant his opinion on the veracity of other witnesses, as such questions intrude on the jury's function to determine witness credibility and also demean and ridicule the witness.

The State also committed misconduct when it bolstered the complainant's testimony during closing argument. When rebutting the defense theory that it would have defied common sense for defendant to repeatedly sexually assault his daughter without anyone knowing, the State argued that "[w]e see that everyday in the news." This reference to matters not supported by trial evidence was improper. The State also improperly argued that an acquittal would send a discouraging message to other victims.

These errors tipped the scale against defendant in a closely balanced case, and therefore amounted to first-prong plain error. The case boiled down to a credibility contest between defendant and his daughter. Although the State presented other witnesses, these witness merely repeated the same version of events that the daughter testified to at trial. The State offered no physical evidence and no expert testimony on the observed effects on child sexual abuse victims in school or around other people. Without any corroboration either way, the evidence was closely balanced.

People v. Barnes, 2017 IL App (1st) 143902 The State alleged that defendant and a co-defendant entered the complainant's hotel room, beat him, and stole his money clip. The complainant identified defendant as the offender, and the co-defendant testified as to the defendant's planning of and participation in the home invasion and robbery. Defendant testified that the complainant invited defendant to his room for purposes of a sexual encounter, and when defendant resisted, the complainant grabbed him, prompting defendant to defend himself.

On appeal, the defendant asserted that the trial court erred in denying his **Lynch** motion, seeking to introduce the complainant's 21-year-old convictions for resisting arrest and battery. The defendant alleged that the age of the convictions are not a part of the **Lynch** analysis, and go to weight rather than admissibility. The Appellate Court disagreed, finding the Illinois Supreme Court, in cases such as **People v. Morgan**, 197 Ill. 2d 404 (2001), has implicitly recognized remoteness as a relevant factor when considering the admissibility of prior convictions under **Lynch**. Furthermore, defendant failed to establish that either prior conviction indicated that the complainant was physically violent toward others.

People v. Yeoman, 2016 IL App (3d) 140324 Where defendant raised self-defense at his trial for second-degree murder of a person who engaged in road rage after defendant honked at him when he sat at a green light, the trial judge did not err by excluding evidence that in a prior road-rage incident, the decedent approached a car and yelled at the driver. Because yelling and disorderly conduct do not constitute violence, the evidence did not show aggressive and violent behavior.

People v. Gibbs, 2016 IL App (1st) 140785 Where the defendant raises self-defense, evidence of the complainant's violent character is relevant to show which party was the aggressor. **People v. Lynch**, 104 Ill.2d 194, 470 N.E.2d 1018 (1984). Such "**Lynch** evidence" may consist of the complainant's previous arrests or convictions for violent crimes.

Where the trial court allowed a stipulation that the complainant had a 14-year-old conviction for domestic violence, the court did not err by refusing to allow the defense to also question the complainant about the conviction. **Lynch** does not require live testimony concerning the complainant's prior conviction, which is "persuasive proof" of the complainant's conduct. By contrast, where the **Lynch** evidence consists of arrests or altercations for which there was no conviction, live testimony is appropriate because the evidence does not indicate whether the individual actually engaged in the alleged conduct.

The court observed that the trial court could have exercised its discretion to allow limited questioning of the complainant about the prior conviction, but did not abuse its discretion by refusing to do so.

People v. Salcedo, 2011 IL App (1st) 083148 Where self-defense is properly raised, the defendant may offer evidence of the complainant's aggressive and violent behavior for two purposes: (1) to demonstrate that defendant's knowledge of the complainant's tendencies affected his perception of and reaction to the complainant's behavior, and (2) to support defendant's account of the events where there are conflicting accounts as to which party was the initial aggressor. **People v. Lynch,** 104 Ill.2d 194, 470 N.E.2d 1018 (1984). Where the evidence is admitted for the first purpose, the defendant must have knowledge of the complainant's violent nature. When evidence is admitted for the second purpose, however, the defendant's knowledge of the complainant's violent character is irrelevant.

Defendant claimed that decdent intentionally drove his car into the defendant's car while the two were traveling down a Chicago street. Defendant claimed that he shot in self-defense after he saw what he believed to be a handgun in the decedent's hand.

The trial judge did not err by refusing to allow the defense elicit evidence of a prior incident where the decedent intentionally drove into another car because he was angry at his girlfriend. Because defendant did not know the complainant or that he allegedly was of violent character, the first purpose was inapplicable. The court also concluded that the evidence was inadmissible under the second theory of **Lynch** because there was no indication that the prior incident occurred while the car was traveling on a road or was occupied. The court stated:

> An individual's tendency to exercise aggression against an inanimate object such as a parked car does not inherently increase the likelihood that the individual exercised aggression against another person . . . The fact that the complainant hit a parked car out of anger with his girlfriend does not even remotely tend to prove that he was aggressively driving his vehicle in a manner to threaten and/or injure the defendant [and

was therefore the aggressor in the incident leading to the offense].

People v. Keller, 267 Ill.App.3d 602, 641 N.E.2d 891 (1st Dist. 1994) Noting a conflict in authority, the court found that evidence of the habits and customs of the victim is admissible when a sufficient foundation is established. The Court declined to decide whether habit and custom evidence is admissible where direct testimony about the offense is available.

People v. Hanson, 138 Ill.App.3d 530, 485 N.E.2d 1144 (5th Dist. 1985) There are at least three purposes for which evidence of an alleged victim's prior acts of aggression may properly be used: to show the reasonableness of the defendant's state of mind in acting in self-defense, to support the defendant's testimony that the alleged victim was the aggressor, and to show the reasonableness of the amount of force used by the defendant. Here, the testimony of witnesses who observed the victim's prior violent acts, coupled with the testimony of the witnesses that defendant was aware of such behavior, was relevant to show defendant's state of mind in acting in self-defense. Additionally, the evidence of the victim's prior violent acts, even without a showing that defendant was aware of them, was relevant to show who was the aggressor. See also, **People v. Booker**, 274 Ill.App.3d 168, 653 N.E.2d 952 (1st Dist. 1995) (fact that deceased was acquitted of previous murder charge did not preclude defendant from testifying that he was aware of the charge; evidence was relevant to show defendant's state of mind, and State could cross-examine him on whether he was aware of the acquittal).

People v. Gorney, 107 Ill.2d 53, 481 N.E.2d 673 (1985) Evidence of prior false accusations of sexual assault by the victim may be admissible in some circumstances, even where no false charge was actually brought. Here, however, any error was harmless. See also, **People v. McClure**, 42 Ill.App.3d 952, 356 N.E.2d 899 (1st Dist. 1976) (where a defendant charged with rape raised a consent defense (that the complainant was a prostitute who became upset when he refused to pay), defendant should have been allowed to introduce evidence that the complainant had falsely accused another man of rape when he refused to pay); **People v. Nicholl**, 210 Ill.App.3d 1001, 569 N.E.2d 604 (2d Dist. 1991) (trial court erred by prohibiting a defendant in an aggravated criminal sexual abuse case from showing that the complainant made a subsequent, unfounded complaint of abuse against the defendant; a false accusation bears on a person's credibility whether it is made before or after the incident giving rise to the charge). Compare, **People v. Alexander**, 116 Ill.App.3d 855, 452 N.E.2d 591 (1st Dist. 1983) (defendant charged with rape was properly prohibited from bringing out two prior rape charges made by the complainant where the prior charges were not shown to be false).

People v. Gosset, 116 Ill.App.3d 655, 451 N.E.2d 280 (2d Dist. 1983) Where defendant seeks to introduce testimony about prior acts of an alleged victim to show that the victim was the aggressor, it need not be shown that the defendant had knowledge of the prior acts at the time of the incident. See also, **People v. Bedoya**, 288 Ill.App.3d 226, 681 N.E.2d 19 (1st Dist. 1997) (where off-duty police officer claimed that the decedent was the aggressor, he was entitled to introduce the decedent's prior acts of violence against police officers; evidence was relevant to whether the decedent had been the aggressor and to rebut inference he would have been reluctant to attack an officer).

People v. Goodwin, 98 Ill.App.3d 753, 424 N.E.2d 429 (5th Dist. 1981) Where defendant testified that he shot the deceased in self-defense after the latter pointed a pistol at him and

repeatedly "snapped" it in an unsuccessful attempt to fire, the State should not have been permitted to present two witnesses who testified that they had never seen the deceased point a gun at anyone. The testimony had the effect of raising an inference of the deceased's peaceable character, which would have been proper only if the defendant had raised that issue.

In addition, evidence of character is confined to proof of a person's general reputation; it is error to prove character by specific acts.

§19-9
Evidence of Escape, Flight, Tampering with Evidence and Witnesses

§19-9(a)
Escape

Illinois Supreme Court

People v. Gacho, 122 Ill.2d 221, 522 N.E.2d 1146 (1988) A letter which defendant wrote to his girlfriend stating his desire to escape from jail was admissible to show consciousness of guilt.

People v. Harper, 36 Ill.2d 398, 223 N.E.2d 841 (1967) The jury may not be instructed that escape raises a presumption of guilt. An escape or attempted escape is to be considered with all the other evidence, but "is not sufficient in itself to overcome the presumption of innocence."

Illinois Appellate Court

People v. Campbell, 126 Ill.App.3d 1028, 467 N.E.2d 1112 (2d Dist. 1984) At defendant's trial for armed robbery, etc., the State introduced evidence that blanket strips were hanging from the ceiling bars of the defendant's jail cell and that some of the strips were tied together.

The Appellate Court held that the above evidence was proper — "construed either as an escape attempt or suicide attempt, the evidence was probative of the defendant's consciousness of guilt." See also, **People v. O'Neil**, 18 Ill.2d 461, 165 N.E.2d 319 (1960) (the threat of suicide, like flight, tends to show consciousness of guilt).

People v. Curtis, 7 Ill.App.3d 520, 288 N.E.2d 35 (3d Dist. 1972) Evidence of defendant's escape was admissible even though it took place 52 days after arrest and defendant had four indictments pending against him at the time.

§19-9(b)
Flight

Illinois Supreme Court

People v. Hayes, 139 Ill.2d 89, 564 N.E.2d 803 (1990) Evidence that the police were looking for but were unable to apprehend the defendant for two weeks following the crime was not relevant on the ground that it raised an inference defendant intentionally concealed himself from the police. Although evidence of intentional concealment is relevant and admissible as a circumstance tending to show consciousness of guilt, the inference of guilt that may be drawn from such evidence depends on defendant's knowledge that a crime has been committed and that he is a suspect. Here, there were no facts from which the jury could validly infer that the defendant knew he was a suspect and consciously avoided the police.

People v. Manion, 67 Ill.2d 564, 367 N.E.2d 1313 (1977) The defendant has a right to show, by any competent evidence, facts which tend to prove that he did not leave the scene of the crime out of a consciousness of guilt.

People v. Butler, 64 Ill.2d 485, 356 N.E.2d 330 (1976) At defendant's armed robbery trial, the State properly introduced evidence that a co-defendant (but not the defendant) fled from the scene, was pursued, and was shot and killed by police. The Supreme Court held that the flight of the co-defendant was properly admissible to explain how his body and revolver came to be some distance away. The Court also noted that the jury was instructed that the flight of the co-defendant was not admissible to prove defendant's guilt.

People v. Harris, 52 Ill.2d 558, 288 N.E.2d 385 (1972) Evidence of defendant's flight from police is admissible as a circumstance tending to show a consciousness of guilt.

People v. Wright, 30 Ill.2d 519, 198 N.E.2d 316 (1964) The State may introduce that defendant resisted arrest four days after the crime. See also, People v. Davis, 14 Ill.2d 196 151 N.E.2d 308 (1958) (arrest two months after crime).

People v. O'Neil, 18 Ill.2d 461, 165 N.E.2d 319 (1960) The threat of suicide, like flight, tends to show consciousness of guilt. See also, People v. Campbell, 126 Ill.App.3d 1028, 467 N.E.2d 1112 (2d Dist. 1984) (same).

Illinois Appellate Court

People v. Wilcox, 407 Ill.App.3d 151, 941 N.E.2d 461 (1st Dist. 2010) Whether an inference of guilt may be drawn from evidence of flight depends upon whether the defendant knew that a crime had been committed and that he or she was a suspect. The evidence did not support an inference that defendant's flight showed guilt of murder - defendant had been told that police were looking for him, but not that he was a suspect for murder, and he believed that police wanted to talk to him about the violation of an I-bond in an unrelated arrest. The court acknowledged that defendant obtained false identification several years after he fled, but held that "[i]f defendant had been fleeing from the murder, he most likely would not have waited so long to obtain fake identification."

Because the evidence did not support an inference that defendant fled Illinois to avoid arrest for the murder in question, the trial court erred by admitting the evidence of flight. Furthermore, because the evidence was prejudicial, the evidence was closely balanced, and during closing argument the State relied heavily on defendant's flight, the plain error rule applied.

People v. Nightengale, 168 Ill.App.3d 968, 523 N.E.2d 136 (1st Dist. 1988) The State was properly allowed to show that as the defendant was walking down the street, police stopped him and asked him to come to the station for a "name check." Defendant refused, pulled a gun on the police and ran. "The probative value of the evidence of defendant's flight is that the jury could infer that defendant had something to hide."

People v. Armstrong, 43 Ill.App.3d 586, 357 N.E.2d 84 (1st Dist. 1976) Evidence showing that defendant hid under a bed to avoid arrest was admissible.

People v. Montgomery, 16 Ill.App.3d 127, 305 N.E.2d 627 (1st Dist. 1973) A defendant may give an explanation of his flight — evidence of defendant's mental state at the time he fled from the scene is proper.

People v. Zertuche, 5 Ill.App.3d 303, 282 N.E.2d 201 (2d Dist. 1972) The concept of flight involves more than merely leaving the scene of a crime.

People v. Maldonudo, 3 Ill.App.3d 216, 278 N.E.2d 225 (1st Dist. 1971) Evidence that defendant secreted himself in the community for two years after incident, by using false identities, was admissible.

§19-9(c)
Tampering

Illinois Supreme Court
People v. Barrow, 133 Ill.2d 226, 549 N.E.2d 240 (1989) At the defendant's trial for murder, the State introduced into evidence several pieces of mail which the defendant, while in custody, had sent to his brother. The mail included a caricature of a rat in the jaws of a skull and was labeled with the nickname of a State's key witness. Another item was a copy of a picture of a man lying under water, with the above witness's name written across his forehead.

The court held that the evidence was improperly admitted because it was "plainly irrelevant to a determination of the defendant's guilt or innocence." An attempt to intimidate or influence a witness is relevant to show a consciousness of guilt; however, there was nothing to suggest that defendant was attempting to influence a witness by sending letters to his own brother and no showing that defendant intended the letters to be seen by anyone other than the brother.

People v. Gacho, 122 Ill.2d 221, 522 N.E.2d 1146 (1988) Where defendant's girlfriend was a State witness who connected defendant to the crime, the State was properly allowed to introduce a letter which defendant sent to the witness before trial. The letter was fairly interpreted an attempt by defendant to "affectionately" influence the witness not to testify against him. "[T]estimony is relevant and admissible that relates to any attempt by a party to conceal or, by threat or otherwise, to suppress evidence or otherwise obstruct an investigation." See also, **People v. McEwen**, 104 Ill.App.3d 410, 432 N.E.2d 1043 (1st Dist. 1982) (State witness was properly allowed to testify that defendant asked her not to come to court).

People v. Baptist, 76 Ill.2d 19, 389 N.E.2d 1200 (1979) The State may introduce evidence showing that a defendant attempted to kill an eyewitness to the crime charged. The State was properly allowed to show that defendant's brother shot an eyewitness where, although defendant was not physically involved in the shooting, there was sufficient evidence connecting him to the offense.

People v. Fiorito, 413 Ill. 123, 108 N.E.2d 455 (1952) A defendant's attempt to destroy evidence may be introduced. See also, **People v. Veal**, 149 Ill.App.3d 619, 500 N.E.2d 1014 (3rd Dist. 1986) (same).

Illinois Appellate Court

People v. Luellen, 2019 IL App (1st) 172019 After a State witness testified that he originally failed to appear in response to a subpoena because he was fearful, the jury sent out multiple notes indicating that at least one juror had safety concerns. The court individually questioned the jurors and replaced one juror who said he was not sure he could give both sides a fair trial. The court then denied defendant's motion for mistrial.

The jury's notes did not show that jurors had engaged in premature deliberations. Before the close of evidence, jurors are not required to remain silent with each other so long as they keep an open mind. The court had repeatedly admonished the jury not to begin deliberations until instructed. And, the fact that one of the notes was signed by someone identified as the "foreman" did not mean the jurors had deliberated. Several jurors had jury experience that would have exposed them to the concept of selecting a foreperson to communicate with the court.

Also, there was no error in admitting evidence of the witness's fear. The witness did not testify about threats, just his own fear from coming forward. The witness's testimony was probative to explain why he had ignored a subpoena and had to be arrested in order to secure his testimony. Further, defendant invited any error where his counsel attempted to diminish the witness's credibility by commenting on his custodial status during opening statements.

People v. Henderson, 2019 IL App (4th) 170305 To prove defendant guilty of unlawful communication with a witness under 720 ILCS 5/32-4(b), the State doesn't need to prove that the "witness" was someone either party intended to call at defendant's pending trial. By soliciting a false affidavit from his ex-girlfriend, averring that she planted the drugs and firearms in his house, and paying her money in exchange, defendant made her a witness despite her lack of any prior connection to the case. The fact that other offenses such as subornation of perjury or bribery might more neatly fit the facts of this case is irrelevant given the prosecution's discretion to charge as it sees fit.

People v. Frazier, 107 Ill.App.3d 1096, 438 N.E.2d 623 (1st Dist. 1982) Where the evidence showed that the complainant and/or her father attempted to "shake down" the defendant for $1000 in return for dismissal of the charges, defendant's unsuccessful attempts to obtain $1000 to pay the complainant did not tend to show a consciousness of guilt and was not admissible.

People v. Goodman, 55 Ill.App.3d 294, 371 N.E.2d 168 (4th Dist. 1977) The defendant's attempted intimidation of a witness is relevant to show consciousness of guilt.

People v. Townsend, 111 Ill.App.2d 316, 250 N.E.2d 169 (5th Dist. 1969) Evidence that defendant offered money to witness to say she made a mistake in identifying him was admissible.

§19-10
Out of Court Statements Generally

§19-10(a)
Definition of Hearsay

United States Supreme Court

Smith v. Arizona, 602 U.S. _____, _____ S. Ct. _____ (No. 22-899) Defendant was arrested and charged with various drug offenses after police officers executing a search warrant discovered him in a shed along with a large quantity of what appeared to be drugs. The suspected drugs were sent to the State lab, where analyst Elizabeth Rast conducted testing and prepared notes and a report documenting her work and conclusions. By the time of defendant's trial, however, Rast no longer worked at the lab. The State indicated it would present the testimony of a different lab analyst, Greggory Longoni, at trial and that Longoni would provide "an independent opinion on the drug testing performed by" Rast.

At defendant's trial, Longoni testified to the methods Rast used to analyze the suspected drugs, stated that the testing conformed to scientific principles as well as the lab's policies and practices, and related what was in Rast's notes and report. Longoni then offered his "independent opinions" as to the identity of the substances in question. Those opinions were the same as Rast's had been, and defendant was convicted of various drug offenses.

Defendant challenged Longoni's testimony as violating the confrontation clause. The confrontation clause provides that a defendant has the right to be confronted with the witnesses against him. It bars the admission into evidence at trial of an absent witness's testimonial hearsay statements unless the witness is unavailable and the defendant had a prior opportunity to cross-examine him or her.

The State argued that Longoni's testimony based on Rast's notes and report was not hearsay because Rast's underlying statements were not admitted for their truth but rather to show the basis for Longoni's independent opinions. The court rejected that argument, noting that "truth is everything" when it comes to basis-testimony for expert opinions. That is, the jury cannot decide whether to credit an expert's opinion without evaluating the truth of the basis for that opinion. Through Longoni's testimony, then, Rast's statements came in for their truth. Accordingly, they were hearsay.

The court also rejected the State's argument that the basis evidence was not hearsay because Arizona Rule of Evidence 703 authorized one expert to testify to the substance of a non-testifying expert's analysis if that analysis formed the basis of the testifying expert's opinion. "Evidentiary rules...do not control the inquiry into whether a statement is admitted for its truth."

The court did not resolve the ultimate question of whether the confrontation clause was violated here, however, because the question of whether Rast's statements were testimonial was not presented in the cert petition and thus was not before the court.

Illinois Supreme Court

People v. Leach, 2012 IL 111534 Pursuant to 725 ILCS 5/115-5.1, reports of autopsies "kept in the ordinary course of business of the coroner's office" and "duly certified" are admissible in "any civil or criminal action." Ill. R. Evid. 803(6) provides for admission as an exception to the hearsay rule of records of regularly conducted activities if kept in the normal course of business, "but not including in criminal cases medical records." Ill. R. Evid. 803(8) codifies the long-standing hearsay exception for records "of public offices or agencies, setting forth . . . matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, police accident reports and in criminal cases medical records and matters observed by police officers and other law enforcement personnel."

Under these statutes and Ill. R. Evid. 803, autopsy reports are admissible as an exception to the hearsay rule. Autopsy reports are not medical reports because a deceased person is not a patient and the medical examiner is not the deceased's doctor.

Regarding the confrontation clause, review of post-**Crawford** decisions including **Williams v. Illinois**, 567 U.S. 50, 132 S. Ct. 2221, 183 L.Ed.2d 89 (2012), shows business records will rarely qualify as testimonial statements because they are prepared in the routine course of the operation of the business activity or the public office or agency, rather than for the purpose of admission against a criminal defendant.

Here, the medical examiner's office does not act as an agent of law enforcement, but is charged with protecting the public health by determining the cause of a death. An autopsy report is prepared in the normal course of operation of the medical examiner's office, to determine the manner and cause of death, which, if determined to be homicide, could result in charges being brought. Even where foul play is suspected, an autopsy might exonerate a suspect. Autopsy reports are not usually prepared for the sole purpose of litigation, even though they might eventually be used in litigation of some sort.

Thus the primary purpose of preparing an autopsy report is not to accuse a targeted individual of engaging in criminal conduct or to provide evidence in a criminal trial. Neither is an autopsy report certified or sworn in anticipation of its being used as evidence. Considering the split of opinion among the justices of the United States Supreme Court, the Illinois Supreme Court concluded that, while it was not prepared to say that an autopsy report could never be testimonial in nature, autopsy reports prepared in the normal course of business of a medical examiner's office are nontestimonial. They are not rendered testimonial merely because the examiner conducting the autopsy is aware that the police suspect homicide and that a specific person might be responsible.

People v. Ramsey, 205 Ill.2d 287, 793 N.E.2d 25 (2002) "[O]nce hearsay is properly admitted, the trier of fact is free to give it its natural probative value."

People v. Caffey, 205 Ill.2d 52, 792 N.E.2d 1163 (2001) As a matter of first impression, information displayed on a "Caller ID" device does not constitute hearsay, because there is no out-of-court asserter. Provided it is relevant, such evidence is admissible upon a showing that the "Caller ID" unit has been shown to be reliable. A showing that a "Caller ID" device is reliable may be established by testimony that the person who received telephone calls checked the device's display and observed the same number appearing each time a particular person called. See also, **People v. Rohlfs**, 368 Ill.App.3d 540, 858 N.E.2d 616 (3d Dist. 2006) (trial court did not abuse its discretion by admitting evidence that certain telephone numbers were displayed on caller ID devices at times relevant to the case; caller ID evidence is admissible if the evidence shows that the caller ID device was reliable; reliability of the complainant's caller ID device was shown by testimony that: (1) whenever a friend called, the friend's phone number was displayed on the caller ID, and (2) every time the recipient received a call from a number subsequently traced to defendant's cellblock at the Tazewell County Jail, the complainant heard the same voice).

People v. Heard, 187 Ill.2d 36, 718 N.E.2d 58 (1999) At defendant's trial for the murder of his ex-girlfriend and her new boyfriend, the trial court properly admitted evidence that a few days before the offenses, the girlfriend's new boyfriend told defendant that he had "done something you couldn't do" because the girlfriend "is pregnant with my baby." The evidence was not hearsay; it was offered not to prove the truth of the matter asserted - that the girlfriend was pregnant with the boyfriend's child - but that defendant was motivated to commit the crimes by his jealousy over the girlfriend's relationship with another man.

People v. Olinger, 176 Ill.2d 326, 680 N.E.2d 321 (1997) Illinois does not recognize the residual hearsay exception contained in Federal Rule of Evidence 804(b)(5). Under that exception, statements that do not satisfy the requirements for traditional hearsay exceptions are admissible if they exhibit equivalent guarantees of trustworthiness.

People v. Lawler, 142 Ill.2d 548, 568 N.E.2d 895 (1991) At defendant's trial for aggravated criminal sexual assault, the evidence showed that after the complainant was abducted she convinced defendant to allow her to call her father. The father asked the complainant a series of "yes-no" questions which informed him of complainant's general location and that she was alone with an armed man. Both the complainant and her father testified about the telephone call.

The Supreme Court held that the evidence was hearsay. There could be no question that the telephone conversation was used as substantive evidence - the prosecutor made substantive use of the conversation in closing argument, and in its brief the State urged that the evidence was "independent evidence" of lack of consent. Thus, the State could not claim that the statement was used only for non-hearsay purposes.

The Court rejected the State's contention that a statement from a witness as to his or her own prior out-of-court statement does not violate the hearsay rule because the witness testifies under oath and is subject to cross-examination. The presence or absence of the declarant in court is irrelevant to determining whether an out-of-court statement is hearsay.

People v. Edwards, 144 Ill.2d 108, 579 N.E.2d 336 (1991) Defendant was convicted of murder and aggravated kidnapping; the victim was buried in a box in the ground and eventually suffocated. After his arrest, defendant asked to talk with his lawyer and the State's Attorney in order to "make a deal." The police were unable to reach defendant's lawyer, and defendant chose to proceed without the lawyer because "we don't have time." The defendant then led the police to the location where the victim was buried. When told that the victim was dead, defendant said, "[O]h no, oh no, he can't be dead."

The Court rejected defendant's contention that his statement at the burial site was a nonhearsay "reaction" rather than a testimonial assertion offered for the truth of the matter asserted. The statement was not a "verbal act;" instead, it gained its evidentiary value from its "substantive content and not simply in the fact it was made."

People v. Rogers, 81 Ill.2d 571, 411 N.E.2d 223 (1980) Hearsay is "testimony of an out-of-court statement offered to establish the truth of the matter asserted therein, and resting for its value upon the credibility of the out-of-court asserter."

Illinois Appellate Court

People v. Chatman, 2022 IL App (4th) 210716 Under Illinois Rule of Evidence 805(b)(5), an out-of-court statement is not barred by the hearsay rule where the party against whom the statement is offered has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. This is commonly known as the "forfeiture by wrongdoing" doctrine.

Here, the State met its burden of showing by a preponderance of the evidence that the witness, Collins, was unavailable, as defined in Illinois Rule of Evidence 804(a). The State asserted that Collins could not be located near the time of defendant's trial, and thus he could not be served or otherwise compelled to come to court. Thus, under 804(a)(5), the State was required to show it had made good-faith reasonable efforts to procure Collins's attendance. This is a fact-specific determination, which the State satisfied with evidence that the police

had put out a notice to other law enforcement that they were looking for Collins, the police attempted to contact Collins on his phone and at several potential addresses, and the police had contacted Collins's family members in an effort to find him. The police knew that Collins had relocated at least once, had disabled his social media accounts, and had obtained a new phone in an effort to protect himself from people who had threatened him because of his cooperation in this case. Under the totality of the circumstances, the State's efforts to locate Collins and procure his attendance were reasonable.

Defendant did not challenge the trial court's finding that he engaged or acquiesced in the wrongdoing which caused Collins's unavailability. Because the appellate court found that the State had established Collins's unavailability, it affirmed the trial court's decision to admit Collins's out-of-court statement against defendant.

People v. Price, 2021 Il App (4th) 190043 The trial court did not err in allowing the State to introduce evidence of the content of deleted text messages between defendant and his brother on the night of the murder. Text messages are authenticated in the same manner as documentary evidence. Here, defendant's brother testified that he recalled texting defendant on the date in question and confirmed the content of the messages, generally. While defendant's brother said he did not recall the exact wording of the messages, any uncertainty goes to weight, not admissibility. The testimony of the author of a text message is generally sufficient to authenticate it. And, here the State also introduced records from Sprint, defendant's cell phone carrier, which corroborated that messages were exchanged between defendant's cell number and his brother's on the night in question.

Further, the text messages were not hearsay where they either directed defendant to take some action ("delete this"), thus showing why defendant acted as he did, and provided context for defendant's actions, thereby showing his state of mind, specifically that he believed the five deleted messages were incriminating. And, the messages were not offered for the truth of the matter asserted where defendant asked his brother for advice about cleaning gunshot residue, and his brother responded with directions on what to do, including to delete the messages.

Finally, although the court had initially ruled prior to trial that the messages would not be admitted, it did not err by reversing its ruling on the motion during trial. A pretrial ruling on a motion *in limine* is an interlocutory order and is not binding. Such rulings are always subject to reconsideration during trial. And, while defendant claimed he was prejudiced by the court's reversal of its pretrial ruling, defendant did not explain how.

People v. Collins, 2021 IL App (1st) 180768 A detective testified that the cell phone he recovered from defendant belonged to the victim of a robbery. He explained the cell phone contained an image of the victim. This testimony was not hearsay. Although admitted for the truth of the matter asserted, the testimony did not contain an out-of-court statement. Rather, it contained the personal observations and inferences of the witness. While the victim may have been the one to identify the phone to the detective, in which case the identification would have involved hearsay, the detective did not so testify. And while the detective did not explain how he observed the image or determined it to be the victim's phone, defendant's failure to object to the testimony created the gap in the explanation.

People v. Ramos, 2018 IL App (1st) 151888 Historical cell site analysis report, showing which towers cell phone pinged and at what times, was hearsay. While such cell phone records are frequently admissible as business records, the State did not call a witness to lay a proper foundation and the report was not certified as self-authenticating in accordance

with Illinois Rule of Evidence 902(11). A detective's testimony as to the locations where the co-defendant's phone traveled during the relevant period was improperly admitted because it was based on the historical cell site analysis report.

The Appellate Court also held that the trial court erred when it prevented defense counsel from using his annotated copy of the trial transcript during his closing argument. The court's blanket prohibition denied counsel access to his notes and could not be justified by the fact that the transcript had not yet been "certified." This error interfered with defendant's sixth amendment right to counsel, and in this closely balanced case, was not harmless beyond a reasonable doubt.

People v. Wills, 2017 IL App (2d) 150240 Where a defendant asserts that the trial court improperly excluded evidence at trial, he must make an offer of proof as to what the excluded evidence would have been in order to provide a complete record for review. The offer of proof does not have to include formal, sworn testimony, but it must be specific and provide details of the evidence in question.

Here, defendant argued that the trial court improperly excluded, as hearsay, evidence of the content of an argument between defendant and the alleged victim, A.W. Defendant asserted that the evidence was not hearsay because it went directly to A.W.'s motive to lie. The Appellate Court agreed that it was error to exclude the evidence, but found that defendant's argument was constrained by the absence of an offer of proof. Without such an offer, the Appellate Court would not speculate that the excluded testimony would have included sufficient detail to have made any difference in the outcome.

In a special concurrence, Justice McLaren noted concern over protecting the anonymity of sexual abuse victims. Justice McLaren recognized that the current Supreme Court Rules do not allow use of initials in the caption of such cases and encouraged the adoption of such a rule or legislation, especially where the defendant and the victim share the same surname.

People v. Burgund, 2016 IL App (5th) 130119 Defendant was convicted of predatory criminal sexual assault of his two children. The State's case consisted of his confession and the testimony of his estranged wife and mother-in-law.

The trial court improperly excluded the testimony of a clinical psychologist who would have supported defendant's claim that he gave a false confession. The psychologist would have testified that defendant had the type of personality that made him highly suggestible and easily led, especially by his wife and mother-in-law. The Appellate Court held that the psychologist should have been allowed to testify. An average juror would not readily understand why an innocent person might falsely believe he committed a crime. The expert's testimony would have thus aided the jury in evaluating the effect of the psychological environment that defendant claimed made him falsely confess. And it would have touched directly on the credibility of defendant's confession.

The court rejected the State's argument that the expert's testimony was properly excluded because he did not diagnose defendant as having any particular psychological or personality disorder. The jury was not required to find that defendant had a disorder before it could disbelieve his confession.

Second, the trial court excluded as hearsay the testimony of two witnesses who would have corroborated defendant's testimony that his wife claimed to have a supernatural power of discernment and was obsessed with making false accusations of lustful behavior. The court also excluded as hearsay the testimony of a witness who dated defendant's wife before she

married defendant and would have described numerous instances where the wife accused the witness of being immoral and lustful.

Illinois Rule of Evidence 801 defines hearsay as an out of court statement offered to prove the truth of the mater asserted. Ill. R. Evid. 801(c). An out of court statement is not hearsay if it is offered merely to show that the statement was made, not that it was true.

The Appellate Court held that the testimony was not offered to prove the truth of the matters asserted in the out of court statements made by defendant's wife. Defendant was not trying to prove that his wife actually had a supernatural power of discernment or that one of the witnesses actually had a problem with immoral and lustful behavior. Defendant instead offered the testimony only to prove that his wife had made the statements. Since the statements supported his defense that his wife treated defendant in a similar manner, the trial court erred in precluding this testimony.

Third, the trial court excluded the testimony of the ex-husband of defendant's mother-in-law. He would have testified that defendant's wife falsely told people that the ex-husband had sexually abused the mother-in-law. Defendant wanted to introduce this evidence to show that his wife would fabricate sexual abuse allegations to gain sympathy and acceptance within their church community.

Illinois law generally prohibits the impeachment of a witness with specific past instances of untruthfulness. But such evidence may be used to impeach a witness if the past act shows bias, interest, or motive to testify falsely.

The Appellate Court held that this evidence was admissible to show the wife's potential motive, interest, and bias in testifying against defendant. The trial evidence showed that defendant's marriage was tumultuous, with accusations that defendant had lust issues, physical violence stemming from those accusations, and discussions of divorce. Evidence that the wife had made false accusations in the past to gain acceptance in her church as it related to divorce was relevant to show that she may have believed that she would personally benefit again from making false accusations against defendant.

The court granted defendant a new trial.

People v. Jacobs, 2016 IL App (1st) 133881 Defendant was charged with possession of a stolen motor vehicle and the State introduced other crimes evidence regarding a burglary at the vehicle owner's home. Defendant was improperly precluded from introducing evidence that another person had been arrested for the burglary of the home. First, the trial judge erred by finding that the excluded evidence was hearsay where it referred only to the fact of an arrest, and not to any out-of-court assertion. Second, the concerns underlying the admission of other-crimes evidence are not present where the uncharged crime was committed by someone other than the defendant. Exclusion of the evidence here was critical because the fact that another person was arrested for the burglary could have dispelled much of the prejudice created by the admission of evidence of the burglary and theft of the jewelry.

The improperly admitted evidence created an inference that defendant had committed a burglary of the home and therefore likely stole the car which he was charged with possessing, directly contradicting his claim that he did not know the vehicle was stolen. In addition, the trial court failed to give a limiting instruction concerning the other crimes evidence. Finally, the risk of prejudice was increased because defendant was impeached with a prior conviction for residential burglary, the offense to which he was improperly linked by the other crimes evidence.

People v. Davis, 2014 IL App (4th) 121040 Defendant argued that his trial counsel was ineffective for failing to object to the introduction of a text message used to prove his intent

to deliver cocaine. The State introduced evidence that a detective searched defendant's cell phone and found a text message asking to meet defendant "for a 30 or a 40." During defendant's interrogation (recorded on video and played at trial), the detective confronted defendant with this message. The detective then testified that he believed this message was about trying to purchase $30 or $40 of cocaine.

The court rejected defendant's hearsay argument because the detective's testimony about the contents of the text message was not offered to prove the truth of the matter asserted in the message. Instead, it was offered to show police investigation and circumstantial evidence of defendant's intent.

People v. Hill, 2014 IL App (2d) 120506 Under Illinois Rule of Evidence 803(3), statements concerning the declarant's then existing state of mind, emotion, sensation, or physical condition are admissible under the "state of mind" exception to the hearsay rule. However, a hearsay statement is not admissible to prove the state of mind, emotion, sensation, or physical condition of a person other than the declarant.

By contrast, a statement is not hearsay if it is offered to show the effect of the statement on the listener's state of mind or to explain why the listener acted as he did. Thus, a statement may be admissible to show that it gave rise to a motive on the part of a person who heard the statement.

The trial court properly admitted notes which the decedent wrote before she died in a fire which defendant was charged with setting. The notes indicated that the decedent intended to end her relationship with defendant.

The evidence showed that defendant and the decedent were arguing in the apartment before the fire broke out, neighbors saw defendant's car speed away moments before the fire was first observed, and the decedent's handwritten notes were likely seen by the defendant because they were found in areas of the home where he had necessarily been during and after the argument. The court concluded that the notes were admissible on two theories - to show the decedent's state of mind, and to show the effect of the notes on defendant, including creating a motive to murder the decedent.

People v. Littleton, 2014 IL App (1st) 121950 At defendant's trial for robbery, the State presented other crimes evidence to prove *modus operandi*. As part of that evidence, the State presented testimony from two retired police officers recounting statements from nine people concerning offenses to which defendant entered guilty pleas several years earlier. The Appellate Court held that the testimony contained inadmissible hearsay.

Out-of-court statements concerning other crimes are not hearsay if offered to prove something other than that the crime occurred. For example, in **People v. Moss,** 205 Ill.2d 139, 792 N.E.2d 1217 (2001) and **People v. Lovejoy**, 235 Ill.2d 97, 919 N.E.2d 843 (2009), statements concerning alleged sexual assaults were properly admitted at murder trials not to show that the sexual assaults had occurred, but to show the defendants' motives to kill persons who could have been witnesses at trials for sexual assaults.

By contrast, statements about unrelated crimes are hearsay if offered to prove that in fact the other crimes occurred. The *modus operandi* exception to the rule against other crimes evidence allows admission of other crimes to prove the identity of a perpetrator, on the theory that if one crime is committed in a unique way it is likely that another crime committed in the same way was the work of the same person. A pattern which gives rise to an inference of the perpetrator's identity exists only if the statements about the other crimes are true. If the statements about the other crimes are not true, there is no unique pattern of crime that would support the *modus operandi* exception.

Thus, statements presented in support of the *modus operandi* exception are offered to prove the truth of the matter asserted - that the other crimes occurred in a particular fashion. Such statements constitute hearsay and are inadmissible unless a hearsay exception applies.

Noting that no Illinois court has recognized an exception to the hearsay rule for statements offered to prove *modus operandi*, the court declined to create such an exception.

However, the erroneous admission of hearsay in this case was clearly harmless where the improper evidence was not a significant factor in the conviction, the properly-admitted evidence was overwhelming, and the improper evidence was largely cumulative. Defendant's conviction was affirmed.

In re Jovan A., 2014 IL App (1st) 103835 The Appellate Court reversed the minor's delinquency adjudication and remanded for further proceedings after finding that the trial judge improperly relied on inadmissible hearsay to establish the minor's guilt.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Generally, hearsay is inadmissible unless it falls within a recognized exception to the hearsay rule. One such exception permits a police officer to testify about information received during the course of an investigation in order to explain why he or she made an arrest or took steps in the investigation. Such testimony is not offered to show the truth of the matters asserted, but merely to show the steps which the officer performed.

However, the exception does not allow an officer to testify to information beyond what is necessary to explain his or her actions. Similarly, the officer may not testify about the content of any statements he received.

The exception for statements made in the course of an investigation has been applied only to testimony by law enforcement officers, and not to testimony by lay witnesses who conducted private investigations. Even if the exception did apply, the testimony in this case would have exceeded the scope of the exception. The witness testified not only to the steps which she took in her private investigation, but also to the content of the craigslist.org advertisement which led her to a bicycle which had been stolen a few minutes earlier.

A police officer testified that the lay witness told him that a stolen bicycle was being sold on craigslist.org. The officer testified that he viewed the website, found a telephone number, and obtained related names, addresses and car registration information. The officer also testified that when he arrested the respondent he called the phone number listed in the advertisement, and the respondent's cellular phone rang.

The Appellate Court concluded that because the detective was a police officer acting in the line of duty, the "course of an investigation" exception applied to the portions of his testimony stating that he viewed the advertisement, obtained information concerning a car, went to a particular address where he observed the car, and arrested the respondent. Such testimony qualified for the investigation exception because it explained the steps the detective took which resulted in the respondent's arrest.

However, the trial court improperly admitted other portions of the detective's testimony, including that the layperson told him that the bicycle was being sold on craigslist.org, the detective called the number listed in the advertisement, and the respondent's cellular phone rang. The court stressed that the investigation exception does not allow an officer to testify to the content of a statement, and that the content of the advertisement related directly to the essence of the dispute at trial - whether the respondent was the person who stole the bicycle. Furthermore, the content of the advertisement was not necessary to explain the course of the detective's investigation.

The hearsay was not harmless where, although there was some evidence that the bicycle in question was the one which had been stolen a few minutes earlier, the trial court's oral pronouncement showed that it relied not on the properly admitted evidence but entirely

on the improper hearsay, which it considered for its truth. Under these circumstances, there was a reasonable probability that the trier of fact would have acquitted the respondent had the hearsay been excluded.

There is a presumption that a trial judge sitting as trier of fact considered only competent evidence, but here the record affirmatively showed that the judge considered the hearsay for its truth when it found that the respondent had stolen the bicycle. The Appellate Court acknowledged that had the trial court based its finding solely on admissible evidence, reversal would not be required.

People v. Miller, 2013 IL App (1st) 110879 The trial court committed plain error at defendant's trial for aggravated possession of a stolen motor vehicle where it sustained a hearsay objection when the defense asked the owner of the car whether she learned, after reporting that the car was missing, that her husband had in fact sold it. The Appellate Court concluded that the question did not necessarily call for a response based on an out-of-court statement, because the record did not indicate how the witness would have come to know that her husband had sold the vehicle. Furthermore, even had the witness learned of the sale from an out-of-court statement, the question would have been proper because it was intended to show the witness's state of mind rather than to prove the truth of the matter asserted – that the car had in fact been sold. The court stressed that the evidence would have been central to the case because the owner's belief that the vehicle had been sold would have rebutted inferences that the car was stolen or that defendant had knowledge of the theft.

The court concluded that reversal was required by the cumulative effect of the exclusion of the evidence and the trial judge's reliance on an incorrect recollection of a witness's testimony. Defendant was prejudiced by the errors because the evidence was closely balanced.

People v. Prather, 2012 IL App (2d) 111104 Evidence that is offered to show a person's knowledge or awareness of a circumstance and not to establish the truth of the circumstance is not hearsay.

The testimony of the complaining witness that she used a home pregnancy test and showed the positive result to the defendant was not hearsay where it was offered only to prove defendant's awareness of her pregnancy, and not that she was in fact pregnant. Because the evidence was being offered to prove only notice or knowledge, not a substantive fact, the State was not required to provide any foundation establishing that the home pregnancy test was in working order and used properly.

People v. Jenkins, 2012 IL App (2d) 091168 Defendant was convicted of obstructing justice based on responding falsely to a police officer's questioning concerning whether he had a son who drove a particular car. On appeal, he argued that the trial court erred by excluding the testimony of the son and of defendant's wife concerning the questions asked by the officer and the answers given by the defendant. Defendant's wife was present during the conversation, and defendant's son overheard the conversation because he was talking to his father over a cell phone when the police approached. At trial, the judge found that the testimony of the defendant's wife and son concerning the conversation was inadmissible hearsay.

The trial court erred by excluding the anticipated testimony of defendant's son and wife as hearsay. All three witnesses witnessed the conversation between the officer and the defendant - defendant and his wife were eyewitnesses, and the son overheard the

conversation over the cell phone by which he was conversing with his father. As occurrence witnesses, all three could testify to the version of events they witnessed.

Furthermore, the trial court erred by finding that testimony about defendant's statements to the officer would have been hearsay. The dispute at trial concerned what questions were asked by the officer and what answers were given by the defendant. Testimony about defendant's statements to the officer were not offered to prove the truth of those statements, but to rebut the officer's testimony that defendant made the statements which the State claimed were false.

Defendant was prejudiced by the exclusion of his wife and son's testimony, because he was required to testify to fill the "significant gaps" in his defense which existed because his witnesses were not allowed to testify. Thus, reversal was required.

People v. Sundling, 2012 IL App (2d) 070455-B Defendant was charged with aggravated criminal sexual abuse against two children. The court concluded that the trial judge erred by admitting three prior convictions for sex offenses against children.

The trial court erred by admitting a 1997 Indiana conviction for child molestation. Although the State introduced a probable cause affidavit from the Indiana case, the affidavit should have been excluded for two reasons. First, the affidavit lacked sufficient indicia of reliability concerning the conduct underlying the conviction because it related to the original charges, not to a subsequent guilty plea which defendant entered after an Appellate Court in Indiana overturned the original conviction.

Second, the affidavit was inadmissible hearsay because it was an out-of-court statement offered to prove the truth of the matters asserted. The court found that the affidavit could not qualify for the business record exception to the hearsay rule; the business record exception does not apply to documents which are prepared in anticipation of litigation, and a probable cause affidavit is clearly created for purposes of litigation.

However, the court concluded that the erroneous admission of the other crimes evidence was not plain error. The defendant did not claim that the error was so serious that it affected the fairness of the trial and challenged the integrity of the process, and the court concluded that the evidence was not closely balanced.

People v. Bailey, 409 Ill.App.3d 574, 948 N.E.2d 690 (1st Dist. 2011) Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted. Out-of-court statements offered for a purpose other than to prove the truth of the matter asserted, such as to show the effect on the listener's state of mind, or to show why the listener acted the way that he or she did, are not hearsay.

The court rejected the defendant's argument that the out-of-court statements she sought to admit were not hearsay because they were offered to explain defendant's conduct. As there was no evidence that defendant actually heard these statements, the evidence could not be used to show its effect on defendant, and it was inadmissible hearsay.

Out-of-court statements that have independent legal significance as "words of contract" are not hearsay. **Kukla Press, Inc. v. Family Media, Inc.**, 133 Ill.App.3d 939, 479 N.E.2d 1116 (1st Dist. 1985). The out-of-court statements that defendant sought to admit were not admissible as non-hearsay words of contract because they did not purport to authorize defendant to do anything.

People v. McNeal, 405 Ill. App. 3d 647, 955 N.E.2d 32 (1st Dist. 2010) The testimony of a nurse regarding the statements of the complainant contained in the triage notes of another

nurse was not hearsay. The testimony was not offered for the truth of the matter asserted, but to explain the actions of the nurse in treating the complainant.

Even if the testimony of the nurse regarding the triage notes was hearsay, it was properly admitted as an exception to the hearsay rule pursuant to 725 ILCS 5/115-13, which authorizes admission of statements of sexual assault victims made to medical personnel for purposes of medical diagnosis and treatment.

People v. Munoz, 398 Ill.App.3d 455, 923 N.E.2d 898 (1st Dist. 2010) Under the "state of mind" exception to the hearsay rule, a hearsay statement may be admissible if it expresses the declarant's state of mind at the time of the utterance, the declarant is unavailable to testify, there is a reasonable probability that the hearsay statements are truthful, and the statements are relevant to a material issue in the case.

The trial court erred by allowing the State's key witness to testify that at various times before her death, the decedent had stated that: (1) she was tired of her relationship with the defendant, and (2) defendant was jealous and always wanted to know where she was and what she was doing. Because the "state of mind" exception authorizes the admission of hearsay only if the declarant's state of mind is relevant to a material issue, the decedent's hearsay statements would be admissible only if her state of mind was relevant, and even then only to prove that state of mind.

The court acknowledged it had previously ordered a new trial because the trial court excluded the declarant's statements indicating that she was in a suicidal state of mind. Such statements were highly relevant to a material issue in the case – whether a murder occurred. By contrast, hearsay concerning the declarant's belief that the defendant was jealous had no relevance and should not have been admitted.

The court concluded that the State attempted to use the hearsay evidence as a "back door" method of proving the truth of the hearsay – that defendant was jealous – and that he therefore had a motive to kill the decedent.

The court rejected the argument that the error was harmless, noting that the evidence was closely balanced and the hearsay went to an alleged motive.

People v. Taylor, 314 Ill.App.3d 658, 732 N.E.2d 120 (3d Dist. 2000) As an issue of first impression, the court held that testimony about conduct observed on a videotape is not hearsay. Relying on precedent from other jurisdictions, the court concluded that such testimony is not "assertive conduct" intended to "convey a message."

The court also found that the testimony about hearing a defendant's voice on the video was not hearsay. The witnesses testified only that they recognized defendant's voice, and did not describe any statements.

People v. Averhart, 311 Ill.App.3d 492, 724 N.E.2d 154 (1st Dist. 1999) Where defendant contended that a police officer "planted" drugs on him in order to discredit him and thereby foreclose further investigation of an earlier complaint which defendant had filed against the officer, the trial court should have admitted both the result of the previous disciplinary hearing and the fact that defendant had been acquitted of charges arising from the violation which gave rise to the complaint. Because this evidence was offered not for its truth, but to show the impact of events on the officer's state of mind and to explain his subsequent conduct, it was not hearsay.

People v. Hill, 278 Ill.App.3d 871, 663 N.E.2d 503 (5th Dist. 1996) The Appellate Court rejected the State's argument that there is a res gestae exception to the hearsay rule. Various

courts and legal scholars have "criticized the notion of res gestae for its imprecision," and the exception fails "to contribute to an understanding of the problem and inhibit[s] any meaningful analysis." In addition, continued use of the res gestae exception "will continue to obscure rational analysis and . . . demean established evidentiary rules designed to promote the admission of reliable evidence." See also, **People v. Dennis**, 181 Ill.2d 87, 692 N.E.2d 325 (1998) (res gestae refers to the circumstances, facts, and declarations which grow out of the main fact and serve to illustrate its character, and which are so spontaneous and contemporaneous with the main fact as to exclude the idea of deliberation or fabrications; as a basis for the admissibility of hearsay evidence, Illinois has abandoned the concept of res gestae).

People v. Quick, 236 Ill.App.3d 446, 603 N.E.2d 53 (1st Dist. 1992) Defendant was convicted of solicitation to commit murder after she asked an undercover officer to kill her husband. Defendant raised entrapment and compulsion, and claimed that she felt compelled to go through with the crime because the friend who first introduced her to the hit men told her that she or her children would be killed if she backed out. On hearsay grounds, the trial court refused to admit defendant's testimony concerning these statements.

The Appellate Court found that excluding such testimony violated defendant's constitutional right to present a defense. The statements were crucial to the compulsion defense, and were not hearsay because they were offered to show their effect on defendant's state of mind and not to prove the truth of the matter asserted.

People v. Velasco, 216 Ill.App.3d 578, 575 N.E.2d 954 (4th Dist. 1991) At defendant's trial for criminal sexual assault, the State argued that a videotape of a police interview of the 31-year-old complainant should be admitted to permit the jury to compare the complainant's manner of speaking during the interview with her testimony in court, to illustrate the interviewing technique so that the jury could assess the credibility of the original complaint, and to allow the jury to assess whether the complainant had the mental capacity to consent to a sexual act. The Court rejected these arguments.

1. Allowing the State to introduce a prior statement for comparison with live testimony would nullify the hearsay rule by authorizing the admission of any out-of-court statement.

2. The videotape could not be introduced to show the circumstances of the interview. Because no evidence had been admitted concerning the statements made during the interview, there was no need to show that such statements were the result of acceptable interviewing techniques.

3. The videotape was not admissible to help the jury assess whether the complainant was capable of consenting to a sexual act, as the jury could make that determination from the complainant's demeanor and in-court testimony.

People v. Orr, 149 Ill.App.3d 348, 500 N.E.2d 665 (1st Dist. 1986) Testimony by State witnesses (that they were at the scene of an arson and saw some individuals struggle with and chase the defendant) was improper. The testimony "related the assertive conduct of others which demonstrated that the persons who 'chased' the defendant believed that he committed the arsons. This assertive conduct was tantamount to a verbal declaration that defendant had committed the crime and should not have been admitted into evidence."

People v. Kneller, 83 Ill.App.3d 325, 403 N.E.2d 1252 (2d Dist. 1980) Testimony about an out-of-court statement may constitute hearsay even though the offering party asserts that it is being offered for a purpose other than to prove the truth of the matter asserted therein.

People v. Higgs, 11 Ill.App.3d 1032, 298 N.E.2d 283 (1st Dist. 1973) Testimony concerning the assertive conduct of a third party, as well as his verbal statements, may be inadmissible hearsay. Testimony that certain persons at the murder scene attacked defendant was hearsay, because it showed that such persons believed defendant to be the murderer.

§19-10(b)
Constitutional Aspects of Hearsay

United States Supreme Court
Ohio v. Clark, 135 S. Ct. 2173, 2175, 192 L. Ed. 2d 306 (2015) The Sixth Amendment Confrontation Clause generally prohibits the introduction of testimonial statements by a witness who does not testify at trial. Under the "primary purpose" test, statements elicited through interrogation are testimonial when the circumstances objectively indicate that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

When the primary purpose of the interrogation is to respond to an ongoing emergency, its purpose is not to create a record for trial and thus statements elicited in response to such interrogation are not prohibited by the Confrontation Clause. But the "existence *vel non* of an ongoing emergency" is not the end of the inquiry; it is just one factor in the ultimate question about the primary purpose of the interrogation.

Teachers at L.P.'s preschool observed suspicious marks on his body and asked him who was responsible. L.P., who was three years old, eventually made statements to the teachers implicating defendant. These statements were introduced at trial, but L.P. did not testify. Defendant argued that the statements were testimonial and thus prohibited by the Confrontation Clause.

The Supreme Court held that the statements were not testimonial. The Court declined to adopt a categorical rule that statements made to persons other than law enforcement officers are never testimonial. But, such statements are much less likely to be testimonial. And considering all the relevant circumstances in this case, L.P.'s statements "clearly were not made with the primary purpose of creating evidence for [defendant's] prosecution," and thus were not barred by the Sixth Amendment.

First, the statements were made in the context of an ongoing emergency about suspected child abuse. When the teachers saw the injuries, they needed to know whether it was safe to release L.P. to his guardian at the end of the day. Their immediate concern was to protect L.P. by identifying and ending the abuse.

Second, there was no evidence that the primary purpose was to gather evidence for defendant's prosecution. The teachers never informed L.P. that his answers would be used to arrest or punish the abuser, and L.P. never indicated that he intended his statements to be used in a prosecution.

Third, L.P.'s young age contributed to the finding that the statements were not testimonial. "Statements by very young children will rarely, if ever, implicate the Confrontation Clause." Few three-year-old children understand the criminal justice system and it is unlikely that someone that young would intend his statements to be a substitute for trial testimony.

Finally, the Court found it highly relevant, if not categorically dispositive, that L.P. was speaking to teachers rather than law enforcement officers. Statements to persons who are not "principally charged with and uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers."

In light of all these circumstances, the Court held that the introduction of L.P.'s statements did not violate the Sixth Amendment.

Williams v. Illinois, 567 U.S. 50, 132 S. Ct. 2221, 183 L.Ed.2d 89 (2012) A plurality of the Court (Alito, J., joined by Roberts, C.J., Kennedy, and Breyer, JJ.), found no Confrontation Clause violation where the prosecution's DNA expert testified she matched defendant's DNA profile to a DNA profile that another laboratory, Cellmark, derived from semen found on the victim's vaginal swabs.

The Confrontation Clause has no application to out-of-court statements not offered to prove the truth of the matter asserted. The out-of-court statement by Cellmark was not offered for its truth, but was related by the expert only for the purpose of explaining the assumptions on which that opinion rested.

Both the Illinois and Federal Rules of Evidence allow an expert to base an opinion on facts made known to the expert of which the expert has no personal knowledge. The expert's reliance on such facts does not constitute admissible evidence of the underlying information. In a jury trial, the disclosure of such underlying information is generally barred. In a bench trial, it is presumed that the judge will understand the reason for the disclosure of the underlying inadmissible information and will not rely on it for any improper purpose.

The prosecution's expert answered in the affirmative when asked, "Was there a computer match generated of the male DNA profile found in semen from the vaginal swabs of [the victim] to a male DNA profile that had been identified as having originated from Sandy Williams?" The testimony that the matching DNA profile was found in the semen from the victim's vaginal swabs was not substantive evidence of that fact; it was a mere premise of the prosecutor's question that the expert assumed to be true.

The plurality found no support for the conclusion that the trial court considered the basis testimony for an improper purpose. The admissible evidence supported the conclusion that the sample tested by Cellmark came from the victim's vaginal swabs, as no other plausible explanation exists for how Cellmark could have produced a DNA profile that matched defendant's.

Independent circumstantial evidence supported the conclusion that Cellmark's profile was deduced from semen found on the vaginal swab. Whether that evidence provided a sufficient foundation for the expert's testimony was not a Confrontation Clause question.

Even if the out-of court statement by Cellmark had been offered for its truth, there was no Confrontation Clause violation. All of the cases in which a Confrontation Clause violation has been found post-**Crawford v. Washington**, 541 U.S. 36 (2004), involve out-of-court statements whose primary purpose was to accuse a targeted individual of engaging in criminal conduct. An objective test is applied to determine the primary purpose that a reasonable person would ascribe to the out-of-court statement, taking into account all of the surrounding circumstances.

The primary purpose of the Cellmark report was not to accuse the defendant or create evidence for use at trial, but to catch a dangerous rapist who was still at large. The report was produced before any suspect was identified. No one at Cellmark could have known whether the profile would turn out to be incriminating or exonerating, or both.

Breyer, J., specially concurred. He believed the case should be set for reargument to address how the Confrontation Clause applies to the "panoply of crime laboratory reports and

underlying technical statements written by (or otherwise made by) laboratory technicians?" In the absence of reargument, he joined the plurality's opinion.

Thomas, J., concurred in the judgment. He agreed with the dissent that Cellmark's out-of-court statements were offered for their truth. He was also critical of the plurality's primary-purpose test as it limits defendant's confrontation right to statements made after the accused's identity becomes known.

He concluded, however, that the admission of Cellmark's statements did not violate the Confrontation Clause because Cellmark's report lacked the requisite formality and solemnity to be considered testimonial. The Confrontation Clause regulates only the use of statements bearing "indicia of solemnity," *e.g.*, depositions, affidavits, prior testimony, or statements resulting from formalized dialogue such as custodial interrogation. The Cellmark report lacks the solemnity of an affidavit or a deposition because it is neither certified nor sworn to.

Kagen, J., joined by Scalia, Ginsburg, and Sotomayor, JJ., dissented.

The report at issue showing that a DNA profile was produced by an analyst at Cellmark from a vaginal swab taken from a rape victim is indistinguishable from the reports in **Melendez-Diaz v. Massachusetts**, 557 U.S. 305 (2009), and **Bullcoming v. New Mexico**, 564 U.S. ___, 131 S. Ct. 2705, ___ L.Ed.2d ___ (2011). Using the prosecution expert as the conduit for this evidence is functionally equivalent to the surrogate testimony offered in **Bullcoming**, yet worse because at least the surrogate witness in **Bullcoming** worked at the lab and was familiar with its procedures.

The dissent rejected the plurality's conclusion that this evidence was not offered for its truth but for the limited purpose of explaining the basis for the expert's conclusion. When an expert repeats an out-of-court statement as the basis for a conclusion, the statement's utility is dependent on its truth. To determine the validity of the expert's conclusion, the trier of fact must assess the truth of the out-of-court statement. Nothing in the expert's testimony indicated that she merely assumed the truth of Cellmark's findings or considered those findings as a hypothesis.

The identity of the decision maker as a judge does not change this analysis. Even if the judge understood that he could not consider the Cellmark report for its truth and found independent circumstantial evidence establishing the source of the sample that Cellmark tested and the reliability of the Cellmark profile, the admission of the expert's testimony would be error, but harmless. Moreover, there are indications to the contrary in the judge's findings where the judge never referred to the circumstantial evidence, but focused solely on the testimony of the expert calling her "the best DNA expert I have ever heard," and referring to defendant as "the guy whose DNA, according to the evidence from the experts, is in the semen recovered from the victim's vagina."

The dissent criticized the plurality for allowing state-law labels to define federal constitutional requirements, which allows the prosecution to do through subterfuge and indirection what the Court had previously held the Confrontation Clause prohibits.

The plurality adopts a test for testimonial evidence (whether the report was prepared for the primary purpose of accusing a targeted individual) that derives from neither the text nor the history of the Confrontation Clause and has no basis in the court's precedents. The typical problem with laboratory analyses has to do with careless or incompetent work, which is unaffected by whether at the time of the test, the police have a suspect. It is also inappropriate to analogize this situation to an ongoing emergency where the swabs were not sent to Cellmark until nine months after the rape and the results were not received for another four months. The assumed trustworthiness of forensic evidence has previously been rejected as a reason to exempt it from the reach of the Confrontation Clause.

"Justice Thomas's approach grants constitutional significance to minutia, in a way that can only undermine the Confrontation Clause's protections." Recognizing a distinction based on whether a document is labeled a "certificate" or a "report of laboratory examination" would invite circumvention, is illogical, and has not been adopted by any other member of the Court.

Bullcoming v. New Mexico, 564 U.S. 647, 131 S. Ct. 2705, 2707, 180 L. Ed. 2d 610 (2011) The Sixth Amendment Confrontation Clause permits introduction of testimonial statements of witnesses absent from trial only where the declarant is unavailable and the defendant has had a prior opportunity to cross-examine. **Crawford v. Washington**, 541 U.S. 36 (2004). There is no forensic-evidence exception to this rule. An analyst's certification prepared in connection with a criminal investigation or prosecution is testimonial and therefore within the compass of the Confrontation Clause.

Michigan v. Bryant, 562 U.S. 344, 344, 131 S. Ct. 1143, 1146, 179 L. Ed. 2d 93 (2011) In **Davis v. Washington** and **Hammond v. Indiana**, 547 U.S. 813 (2006), the court concluded that statements made in response to police questioning are "testimonial" if the objective circumstances indicate that the primary purpose is to establish or prove past events for potential use in a subsequent criminal prosecution. Such statements are nontestimonial if the primary purpose is to enable police to meet an ongoing emergency.

The court found here that any statement made with a primary purpose other than to create evidence should be deemed nontestimonial. Factors besides ongoing emergencies may demonstrate that the primary purpose of a statement was not to create evidence for a trial. In determining the primary purpose of a statement, "standard rules of hearsay, [which are] designed to identify some statements as reliable, will be relevant."

An objective test is used to determine the primary purpose of statements made during police interrogation. In other words, statements are nontestimonial if the primary purpose of reasonable persons in the positions of the declarant and the officers who conducted the interrogation would not have been to create evidence for trial.

To avoid difficulties caused by the fact that parties may act with mixed motives, the primary purposes of both the declarant and the interrogators must be considered. "In many instances, the primary purpose of the interrogation will be most accurately ascertained by looking to the contents of both the questions and the answers."

Here, the declarant's statements were nontestimonial. In **Davis** and **Hammond**, the question was whether statements had the primary purpose of dealing with an "ongoing emergency" concerning domestic disputes. Here, police found a person who had suffered a gunshot wound which later proved to be fatal. Because the officers did not know who had fired the shot, where the incident had occurred, whether the victim was in danger of a renewed attack, or whether the assailant might target other individuals, the primary purpose of the interrogation was to allow police to deal with a possible threat to public safety.

The extent of the threat to public safety was affected by the fact that a firearm had been used, as compared to the assailant's fists in **Davis** and **Hammond**. Furthermore, the questioning occurred in an informal manner at the scene, a situation that was less likely to have been intended to create evidence than formal questioning at a police station.

The determination of the primary purpose was also impacted by the declarant's medical condition, to the extent that it shed light on the likelihood that he was concerned with providing evidence against his assailant. The declarant's medical condition also provided "important context" to the police in evaluating the nature of the threat to public safety.

Here, the declarant was suffering from a mortal gunshot wound and interrupted the questioning to inquire when emergency medical services would arrive. Under such circumstances, it is unlikely that his focus was on creating evidence to be used against the defendant. Because the circumstances objectively indicate that the primary purpose of the interrogation was to enable the police to meet an ongoing emergency, the declarant's statements were nontestimonial. Therefore, the statements were properly admitted at trial.

The court acknowledged, however, that the emergency did not continue until the perpetrator was apprehended a year later. It was unnecessary to determine the precise instance at which the primary purpose shifted, however, because all of the statements which the prosecution introduced at trial occurred within the first few minutes after the police arrived and well before they secured the scene.

In a footnote, the court noted that **Crawford** raised the possibility that "dying declarations" are nontestimonial. The only factual basis for admitting the statements was as excited utterances, however, and the lower courts did not address the possibility that the statements were dying declarations.

In a second footnote, the majority stated that apart from the Confrontation Clause, the due process clauses of the Fifth and Fourteenth Amendments may bar the admission of unreliable evidence.

Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) The affidavit of a laboratory analyst indicating the result of the analysis of a seized substance was clearly testimonial hearsay – **Crawford** itself specifically mentioned affidavits in discussing types of testimonial evidence. Thus, **Crawford** required the analyst to testify before the affidavit could be admitted.

The court rejected several arguments advanced by the State "to avoid this rather straight-forward application" of **Crawford**, including that: (1) only "accusatory" or "conventional" witnesses need be subjected to confrontation, (2) evidence of "neutral, scientific testing" is not subject to **Crawford** because it is not "prone to distortion or manipulation," (3) affidavits prepared by laboratory analysts for use at trial are "akin" to business records, which qualify for a hearsay exception, (4) the defendant could have subpoenaed the analyst had he wanted live testimony, and (5) relaxation of the Confrontation Clause is necessary to accommodate the "necessities of trial."

In the course of its holding, however, the court noted that State statutes requiring the defense to give pretrial notice of its confrontation-based objection to use of an analyst's affidavit at trial are not necessarily unconstitutional, at least "[i]n their simplest form." The court found that such statutes do not shift any burden to the defendant; instead, they require the State to disclose before trial that it intends to introduce the analyst's report, and merely require the defendant to assert his constitutional right to confrontation at that time rather than waiting until trial.

Giles v. California, 554 U.S. 353, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008) The Crawford rule is subject to two exceptions: (1) out-of-court statements by a declarant who was on the brink of death and aware that he was dying, and (2) out-of-court statements by a declarant who became unavailable due to actions which the defendant performed with the intent of preventing the witness from testifying (i.e., the "forfeiture by wrongdoing" doctrine).

The "forfeiture by wrongdoing" doctrine applies only under the circumstances recognized at common law - when the defendant's actions were intended to make the witness unavailable. Unless an offense is committed for the purpose of preventing a witness from

testifying, the forfeiture doctrine does not apply on the theory that by committing the offense with which he is charged, the defendant caused the witness to be unavailable.

Thus, the "forfeiture by wrongdoing" doctrine did not apply in a murder prosecution under the theory that by committing the murder, defendant prevented the decedent from testifying.

Whorton v. Bockting, 549 U.S. 406, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007) Crawford v. Washington does not apply retroactively to collateral review. But see, **In re Rolandis G.**, 232 Ill.2d 13, 902 N.E.2d 600 (2008) (Crawford applies retroactively to all cases which were pending on direct review when Crawford was decided).

Davis v. Washington; Hammon v. Indiana, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) **Crawford v. Washington**, did not provide a comprehensive definition of the term "testimonial," because the hearsay in question in that case - a witness's statement in a police station several hours after the alleged offense - qualified under any definition. Here, the court again declined to give a definitive definition of the term "testimonial," but stated:

> "Statements are not testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

Thus, statements are not "testimonial" when made during a 911 call in which the declarant reports an ongoing crime, is facing an ongoing emergency, and seeks help "against *bona fide* physical threat." By contrast, statements made in response to police questioning by officers who respond to a report of a domestic disturbance are testimonial where no emergency is in progress and the officers are seeking information about prior events.

The court noted that a conversation which begins as an interrogation to determine the need for emergency assistance can "evolve into testimonial statements" once the original purpose has been achieved, and that testimonial portions of such statements should be redacted.

Statements need not be made in response to interrogation to be "testimonial." In addition, the court assumed without deciding that 911 operators are law enforcement agents.

The court rejected the argument that the Confrontation Clause is limited to in-court testimony and formal depositions. The primary factor for determining whether a statement is testimonial is whether it was primarily designed to establish or prove some past event or fact.

Statements to a 911 operator in Davis were not testimonial, because they were statements about an ongoing crime and were an attempt to obtain police assistance. Statements in Hammon were clearly "testimonial" because any emergency had passed and the officers were investigating past criminal conduct.

The court rejected the argument that domestic violence cases require "greater flexibility in the use of testimonial evidence," because such offenses are "notoriously susceptible to intimidation or coercion." Issues of intimidation or coercion should be resolved by application of the "forfeiture by wrongdoing" doctrine, which provides that defendants may forfeit their confrontation clause rights by taking action which results in a declarant being unavailable to testify. While it took no position on the proof necessary to show a forfeiture by

wrongdoing, the court noted that cases applying the Federal Rules of Evidence generally hold the government to a preponderance-of-the-evidence standard. The court stated that on remand, the Indiana court is free to determine whether a claim of forfeiture by wrongdoing has been properly raised and is meritorious.

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) Where "testimonial" hearsay is to be offered into evidence at a criminal trial, the Sixth Amendment requires a showing that: (1)the witness is unavailable, and (2) the defendant had a prior opportunity to cross-examine the declarant concerning the testimony. **Ohio v. Roberts**, 438 U.S. 56 (1980) erred by suggesting that the Confrontation Clause can be satisfied by the trial court's finding that testimonial hearsay is reliable; although the Confrontation Clause is intended to insure that evidence is reliable, such reliability is assessed in only one way - "by testing in the crucible of cross-examination."

"Testimonial" statements include, at a minimum, testimony at a preliminary hearing, before a grand jury or at a previous trial, and statements made in response to police questioning. Equivalent statements (such as affidavits and depositions), as well as statements which a reasonable declarant would believe might be used by the prosecution at trial, may also be "testimonial."

Because a statement made by defendant's wife during police interrogation was clearly "testimonial," and defendant had no opportunity for cross-examination due to the State's marital privilege, the Confrontation Clause precluded admission of the statement.

Most traditional hearsay exceptions involve non-testimonial hearsay, for which the Sixth Amendment permits States to exercise flexibility in developing the law of hearsay. The court acknowledged that the "dying declaration" exception involves testimonial hearsay, but held that it need not decide here whether the Confrontation Clause permits a "dying declaration" exception to the Sixth Amendment. See also, **People v. Ingram**, 382 Ill.App.3d 997, 888 N.E.2d 520 (1st Dist. 2008) (admission of statements which qualify for the "dying declaration" exception to the hearsay rule does not violate **Crawford v. Washington**, even where there was no opportunity for cross-examination; the statements at issue here were not "testimonial," and the **Crawford** opinion states that even "testimonial" dying declarations are admissible); **People v. Redeaux**, 355 Ill.App.3d 302, 823 N.E.2d 268 (2d Dist. 2005) (tape-recorded conversations between undercover agent and a coconspirator were admissible despite **Crawford v. Washington**; the decision in **Crawford** was not intended to abrogate "firmly rooted exceptions to the hearsay rule," such as the co-conspirators' exception; in addition, the tape-recorded statements were not "testimonial" where they were given in furtherance of the planned drug sale, not in response to formal and systematic questioning).

Illinois Supreme Court

People v. Peterson, 2017 IL 120331 Defendant was convicted in a jury trial of the first degree murder of his third ex-wife, and was sentenced to 38 years imprisonment. At the time of his third ex-wife's death, defendant was married to his fourth wife. At the time of the trial, defendant's fourth wife was deceased.

After finding that the forfeiture by wrongdoing doctrine was satisfied, the trial court permitted the State to admit several hearsay statements that had been made by defendant's third and fourth wives. The forfeiture by wrongdoing doctrine permits the admission of hearsay statements where the declarant is unavailable for trial due to actions performed by the defendant with the intent of making the witness unavailable to testify.

At the time of trial, Illinois had two versions of the forfeiture by wrongdoing doctrine. First, the common-law doctrine has been recognized by Illinois case law and codified in Illinois Rule of Evidence 804(b)(5). The common law doctrine and Rule 804(b)(5) permit the introduction of an absent witness's statement where the defendant engaged in conduct designed to prevent the witness from testifying.

In addition, the legislature had enacted 725 ILCS 5/115-10.6, which allowed the admission of hearsay where the defendant killed the declarant with intent to procure his or her unavailability to testify, provided that there are sufficient safeguards of reliability and the interests of justice would be served by admitting the evidence. The trial court admitted the statements of defendant's former wives under §115-10.6.

The separation of powers doctrine does not require a complete divorce between the branches of government, however. Thus, although the Supreme Court is empowered to promulgate rules governing admission of evidence at trial, the General Assembly may legislate in this area without offending the separation of powers doctrine so long as legislative enactments do not create an irreconcilable conflict with a court rule. Where an irreconcilable conflict exists, the court rule prevails.

The court concluded that §115-10.6 and Rule of Evidence 804(b)(5) contain an irreconcilable conflict, and that the statute must therefore give way to Rule 804(b)(5). Rule 804(b)(5) identifies only two criteria to be satisfied for the admission of relevant hearsay statements: (1) that the party against whom the statement is offered has engaged or acquiesced in wrongdoing, and (2) that such wrongdoing was intended to, and did, procure the unavailability of the declarant as a witness.

By contrast, §115-10.6 applies only to cases involving the declarant's murder and requires the satisfaction of additional criteria concerning the reliability of the statements and the interests of justice. The court found that an irreconcilable conflict with Rule 804(b)(5) existed because the common law doctrine and Illinois case law hold that the defendant forfeits his ability to challenge the reliability of the declarant's statements by the very act which prevents the declarant from testifying and because requiring additional indicia of reliability "would undermine the equitable considerations at the very center of the forfeiture by wrongdoing doctrine."

However, the court concluded that the hearsay statements were admissible under the common law forfeiture by wrongdoing doctrine. The State's burden of proof at a forfeiture by wrongdoing hearing is by a preponderance of the evidence. The defendant did not challenge the trial court's finding that the State established wrongdoing where it showed by a preponderance of the evidence that defendant murdered both his third and fourth wives. However, defendant challenged the trial court's finding that the State established by a preponderance that he murdered the two women in order to make them unavailable as witnesses.

In rejecting defendant's argument, the court reiterated that the common law doctrine of forfeiture by wrongdoing applies where the defendant intended to prevent the witness from testifying. However, it rejected defendant's argument that to prove such intent, the State must identify specific testimony from the absent witness which the defendant wished to prevent. In addition, the forfeiture by wrongdoing doctrine does not depend on the existence of a legal proceeding at the time defendant acts to prevent the witness from being available to testify or that a desire to make the declarant unavailable to testify is the defendant's sole motivation in committing the crime.

The Supreme Court concluded that the trial court did not abuse its discretion by finding that defendant murdered his third and fourth wives with the intent of keeping them from testifying at divorce proceedings or at defendant's trial for murder.

People v. Hood, 2016 IL 118581 A criminal defendant has a constitutional right to physically face persons who testify against him and to conduct cross-examination. Under **Crawford v. Washington**, 541 U.S. 36 (2004), where the State seeks to admit "testimonial" hearsay, it must establish both that the declarant is unavailable to testify at trial and that defendant had a prior opportunity for cross-examination. Under **Crawford,** depositions are testimonial hearsay.

Here, the State sought to admit the deposition of the complainant. The complainant's attending physician testified that at the time of trial, the complainant was living in a nursing home and was unable to care for himself. In addition, the testimony established that the complainant was suffering from severe dementia, had no awareness of his environment, and was unable to communicate in any meaningful way.

Furthermore, defendant had the opportunity for cross-examination although he was not present at the deposition. The court noted that defendant was not barred or prevented from attending the deposition; in fact, the trial court's order for the deposition directed the Cook County Sheriff to transport defendant to the deposition "over the objection of the defendant." This paragraph was then crossed out by hand. In addition, two assistant public defenders appeared on defendant's behalf at the deposition and conducted cross-examined.

Because both the unavailability of the complainant and a prior opportunity for cross-examination were shown, admission of the deposition did not violate **Crawford**.

Similarly, admission of the deposition did not violate defendant's due process right to be present. The due process right to be present is a "lesser right" that is violated only if the defendant's absence results in an unfair proceeding or the loss of an underlying substantial right. The court found that because defendant's confrontation rights were not violated, there could be no violation of the secondary due process right to be present.

Supreme Court Rule 414(e) provides that defendant and defense counsel have the right to confront and cross-examine any witness whose deposition is taken, but that defendant and defense counsel "may waive such right in writing." The court rejected the argument that the trial court violated Rule 414(e) by admitting a deposition that had been obtained without defendant's written waiver. The court found that the written waiver requirement was not constitutionally mandated, but was merely a procedural rule to ensure the defendant was given notice of the deposition and an opportunity to appear. Where it was clear that defendant knew of the deposition and that he could attend if he wanted, the absence of a written waiver did not cause prejudice.

People v. Barner, 2015 IL 116949 Pluralities of the U.S. Supreme Court have held that scientific reports are "testimonial" where the primary purpose of an affidavit or report was to provide *prima facie* evidence of the nature of an analyzed substance and it could be safely assumed that the analyst was aware of the affidavit's evidentiary purpose (**Melendez-Diaz v. Massachusetts**, 557 U.S. 305 (2009)), or the primary purpose for preparing a report on a suspected drunk driver's blood alcohol level was so the report could be introduced at trial (**Bullcoming v. New Mexico**, 564 U.S. 647, 131 S. Ct. 2705, 2707, 180 L. Ed. 2d 610 (2011))).

Justice Thomas provided the fifth vote in both **Melendez-Diaz** and **Bullcoming**, and in the former case rejected the plurality's conclusion that whether a report is testimonial depends on its primary purpose. Instead, Justice Thomas believes that extrajudicial statements are testimonial and thus implicate the Confrontation Clause only to the extent they are formalized and solemn. Thus, Justice Thomas would afford testimonial status to such materials as affidavits, depositions, prior testimony, or confessions.

In **Williams v. Illinois**, 567 U.S. ___, 132 S. Ct. 2221 (2012), a four-member plurality found that the Confrontation Clause was not violated by an expert's testimony concerning testing performed by nontestifying analysts because: (1) the testimony was not offered for the truth of the matter asserted, and (2) the Confrontation Clause does not apply to a report concerning testing that was conducted before any suspect was identified and was intended to identify the offender rather than creating evidence to be used against a particular person.

In **Williams**, the fifth vote was again provided by Justice Thomas, who stated that although the testimony was offered for the truth of the matters asserted it lacked the solemnity and formality associated with testimonial evidence.

The Illinois Supreme Court concluded that under **Williams**, whether a scientific report is testimonial depends on whether a reasonable person would believe that the report was made for the purpose of proving the guilt of a particular defendant at trial. **People v. Leach**, 2012 IL 111534. The **Leach** court noted the position of the **Williams** dissenters - that a report is testimonial if it is made for the purpose of providing evidence against *any* person - but found that the autopsy reports at issue in that case did not satisfy the standard of either the plurality or dissent.

Here, a reasonable person would not believe that the DNA testing in this case was performed for the purpose of proving the guilt of defendant, because the testing was performed before defendant was a suspect and for the purpose of uploading a DNA profile to a statewide law enforcement database. Thus, an expert's testimony concerning testing conducted by other analysts was not testimonial. The court also found that if Justice Thomas's standard was applied, the testimony lacked the formality and solemnity required for a finding that it was testimonial.

The court rejected the argument that where the blood sample on which the testing was performed had been drawn because defendant was a suspect in a murder, the evidence was testimonial although it was admitted at a trial for unrelated sexual assaults for which defendant was not a suspect at the time of the testing. The court stressed that the reports had been produced for the purpose of solving the unrelated murder and that the analysts could not have known that their reports would become evidence in the sexual assault case.

The court also concluded that even if **Crawford** was violated by an expert's testimony concerning additional testing that was subsequently performed by nontestifying analysts, the error was harmless beyond a reasonable doubt. Admission of testimonial hearsay is harmless where the error did not contribute to the verdict obtained at trial. In determining whether an error is harmless, a reviewing court may consider whether the error might have contributed to the conviction, whether the properly admitted evidence overwhelmingly supports the conviction, and whether the improperly admitted evidence is cumulative to properly admitted evidence. The court concluded that in light of the properly admitted evidence, any violation of the right to confrontation concerning the subsequent testing was harmless.

In re Brandon P., 2014 IL 116653 The court agreed with the State's concession that out-of-court statements made by the three-year-old complainant to a police officer were "testimonial" for purposes of the confrontation clause. Statements to police are testimonial when the circumstances objectively indicate that the primary purpose of the interrogation is establish past events potentially relevant to criminal prosecution.

Here, the primary purpose of the interview was to establish events for a potential criminal prosecution. Thus, statements made during the interview were testimonial.

The court agreed with the State's concession that the three-year-old was unavailable to testify for purposes of 725 ILCS 5/115-10. Under §115-10, "unavailable" witnesses include children who are unable to testify because of fear. **People v. Stechly**, 225 Ill. 2d 246 (2007).

The record here shows that the complainant was unavailable because of her fear and youth. She could barely answer the trial court's preliminary questions, and froze when the State began its direct examination. The trial court, defense counsel, and the prosecutor all agreed that the complainant was unavailable. Under these circumstances, the trial court did not abuse its discretion by finding that the witness was unavailable for purposes of §115-10.

People v. Leach, 2012 IL 111534 Pursuant to 725 ILCS 5/115-5.1, reports of autopsies "kept in the ordinary course of business of the coroner's office" and "duly certified" are admissible in "any civil or criminal action." Ill. R. Evid. 803(6) provides for admission as an exception to the hearsay rule of records of regularly conducted activities if kept in the normal course of business, "but not including in criminal cases medical records." Ill. R. Evid. 803(8) codifies the long-standing hearsay exception for records "of public offices or agencies, setting forth . . . matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, police accident reports and in criminal cases medical records and matters observed by police officers and other law enforcement personnel."

Under these statutes and Ill. R. Evid. 803, autopsy reports are admissible as an exception to the hearsay rule. Autopsy reports are not medical reports because a deceased person is not a patient and the medical examiner is not the deceased's doctor.

Regarding the confrontation clause, review of post-**Crawford** decisions including **Williams v. Illinois**, 567 U.S. 50, 132 S. Ct. 2221, 183 L.Ed.2d 89 (2012), shows business records will rarely qualify as testimonial statements because they are prepared in the routine course of the operation of the business activity or the public office or agency, rather than for the purpose of admission against a criminal defendant.

Here, the medical examiner's office does not act as an agent of law enforcement, but is charged with protecting the public health by determining the cause of a death. An autopsy report is prepared in the normal course of operation of the medical examiner's office, to determine the manner and cause of death, which, if determined to be homicide, could result in charges being brought. Even where foul play is suspected, an autopsy might exonerate a suspect. Autopsy reports are not usually prepared for the sole purpose of litigation, even though they might eventually be used in litigation of some sort.

Thus the primary purpose of preparing an autopsy report is not to accuse a targeted individual of engaging in criminal conduct or to provide evidence in a criminal trial. Neither is an autopsy report certified or sworn in anticipation of its being used as evidence. Considering the split of opinion among the justices of the United States Supreme Court, the Illinois Supreme Court concluded that, while it was not prepared to say that an autopsy report could never be testimonial in nature, autopsy reports prepared in the normal course of business of a medical examiner's office are nontestimonial. They are not rendered testimonial merely because the examiner conducting the autopsy is aware that the police suspect homicide and that a specific person might be responsible.

People v. Torres, 2012 IL 111302 Evidentiary and constitutional requirements for the admission of former testimony are the unavailability of the witness at trial and an adequate opportunity to effectively cross-examine the witness at the prior hearing. The proponent of the evidence bears the burden of proving the necessary elements for admissibility.

Unavailability is a narrow concept, subject to a rigorous standard. A witness is not unavailable unless the prosecutorial authorities have made a good-faith effort to obtain his

presence at trial. The law does not require the doing of a futile act. But if there is a possibility, albeit remote, that affirmative measures might produce the witness, the obligation of good faith may demand their effectuation. The lengths to which the prosecution must go to produce a witness is a question of reasonableness.

In considering whether there was a prior adequate opportunity to cross-examine the witness, a court should look to whether the motive and focus of the examination conducted at the prior hearing was the same or similar to that which would have been conducted at trial. The motive-and-focus test is not the sole guide to resolution of the question of the adequacy of the prior opportunity to cross-examine, however.

Two other factors are also relevant. Defendant must be afforded the freedom to fully question the witness regarding critical areas of observation and recall, to test him for any bias and prejudice, and to otherwise probe for matters affecting his credibility. What counsel knows while conducting the cross-examination may also impact counsel's ability and opportunity to effectively cross-examine the witness at the prior hearing. Counsel's opportunity to cross-examine may not have been adequate if the hearing was conducted without the benefit of discovery.

The State sought to admit at defendant's trial the preliminary hearing testimony of an occurrence witness. The State alleged that the witness was unavailable because he had been deported to Mexico more than 20 years prior. Simply establishing the fact of deportation may not be enough to establish the witness's unavailability. But since the parties agreed that the witness had been deported, and the defense conceded that the requirement of unavailability had been met, the court concluded that the defense forfeited any challenge to the unavailability of the declarant.

Defendant had not been afforded an adequate opportunity to cross-examine the witness at the preliminary hearing, however, and therefore the former testimony was inadmissible. At that hearing, counsel was not privy to inconsistent statements that the witness had given to the police that might have been used to confront the witness and induce further changes in the witness's version of the events. Counsel also was unaware of the status of the witness as an alien, or the circumstances of his departure from the United States, all of which might have been relevant to a motive of the witness to curry favor with the State.

The preliminary hearing court also placed restrictions—overt and covert—on defense counsel's cross-examination. Remarks that the court made at the start of the hearing evinced that the court was not enthusiastic about proceeding immediately with the hearing. Two objections that the court sustained when defense counsel attempted to probe for possible bias and prejudice of the witness also appeared to send "the message to counsel to wrap it up, and counsel did just that. We think it clear from the record that counsel would have done more with the witness at the preliminary hearing if he had felt free to do so."

The error in the admission of the preliminary hearing testimony of the witness was not harmless as his testimony was the only trial evidence placing defendant inside the bar where the shooting occurred at or near the time of the shooting.

People v. Kitch, 239 Ill.2d 452, 942 N.E.2d 1235 (2011) The defense has an adequate opportunity to cross-examine a witness to satisfy the Sixth Amendment where the witness testifies on direct examination in sufficient detail to establish the element of each charged offense.

Defendant was charged with multiple counts of predatory criminal sexual assault of his stepdaughter and stepson and aggravated criminal sexual abuse of his stepson. It was undisputed that defendant was over the age of 17 and that the victims were under the age of 13 when the offenses occurred. Although it may have been unclear from the testimony of

the victims when every act of sexual penetration or sexual conduct occurred, the State was not required to prove the dates of commission, only to provide some way to differentiate between the various counts. The direct-examination testimony of the stepdaughter and stepson established separate acts of sexual penetration or conduct as charged by the State during the relevant time period. Therefore their testimony provided enough detail to allow for effective cross-examination within the meaning of the Sixth Amendment.

A statute is unconstitutional on its face only if no set of circumstances exist under which it would be valid.

Section 115-10 of the Code of Criminal Procedure, 725 ILCS 5/115-10 allows admission of a child victim's hearsay statements if: (1) the court finds the statement reliable and the child testifies at trial, or (2) the child does not testify, the court finds the statement reliable, and the allegation of sexual abuse is independently corroborated.

The confrontation clause places no restriction on the admission of hearsay testimony under scenario one above since the declarant testifies at trial and is present to defend or explain that testimony. Where the child does not testify under scenario two above, testimonial statements are admissible under **Crawford v. Washington**, 541 U.S. 36 (2004), only if the defendant had a prior opportunity to cross-examine the declarant.

That under both scenarios the statement must also meet the additional reliability requirement set forth in **Ohio v. Roberts**, 448 U.S. 56 (1980), that was repudiated in **Crawford**, is not problematic. This requirement only provides the defendant with additional protection over and above that provided by the confrontation clause. It does not affect the constitutionality of § 115-10 because the hearsay testimony must still satisfy **Crawford**'s constitutional requirements in addition to the statutory requirement of reliability. The evidentiary question of whether hearsay testimony satisfies a statutory exception such as § 115-10 is separate from, and antecedent to, the issue of whether admitting the testimony satisfies the confrontation clause. Therefore, the fact that § 115-10 does not incorporate the limitations on admissibility imposed by **Crawford** does not affect its constitutionality.

People v. Hanson, 238 Ill.2d 74, 939 N.E.2d 238 (2010) The trial court did not err by admitting testimony by the sister of one of the decedents concerning a conversation which she had with the decedent about six weeks before the latter's death. In that conversation, the decedent said that defendant had threatened to kill her if she told their father that defendant had obtained credit in their parents' names.

The State admitted that the statements were hearsay, but argued that defendant had forfeited his right to challenge the evidence under the "forfeiture by wrongdoing" doctrine. Defendant did not dispute the finding that he acted with intent to make the decedent unavailable, but argued that the doctrine of forfeiture by wrongdoing does not permit nontestimonial hearsay to be admitted. In the alternative, defendant argued that if nontestimonial hearsay can be admitted under the forfeiture by wrongdoing doctrine, the trial court must first consider whether the statements are sufficiently reliable to be considered.

The court concluded that the forfeiture by wrongdoing doctrine is not merely a basis by which the defendant's constitutional right to confrontation may be extinguished. Instead, the doctrine also constitutes an exception to the hearsay rule which allows the admission of both testimonial and nontestimonial hearsay.

Furthermore, the reliability of the statements need not be considered in determining whether statements are admissible under the forfeiture by wrongdoing doctrine. The court stressed that by intentionally preventing the declarant from testifying, the defendant forfeited his ability to challenge the reliability of the statements. "Requiring additional

indicia of reliability would . . . undermine the equitable considerations at the center of the doctrine."

The trial court did not err by admitting a detective's testimony that while talking to the defendant, he stated that defendant's sister believed defendant had committed the murders. Defendant did not waive the issue by cross-examining the witness about the statement after defense counsel's objection to admissibility was overruled.

The court rejected the argument that the testimony was improper opinion evidence. Neither the detective nor the sister testified about the sister's present opinion of defendant's guilt or innocence. Instead, the evidence concerned a conversation which occurred immediately after the offenses, when the sister reported to police that defendant might have been responsible.

The evidence was relevant in that it explained why the investigation had focused on the defendant, and answered defendant's earlier question to the officer about why he was being questioned. The evidence was not hearsay. An out-of-court statement is admissible if offered for some purpose other than to establish the truth of the matter asserted. The evidence was not offered to prove that defendant was guilty, or even to prove that the sister thought he was guilty. Instead, it was intended to provide context for the investigation and explain defendant's state of mind when he returned to Illinois.

The evidence should not be excluded because the danger of unfair prejudice outweighed any probative value. The court noted that the sister was not an authority figure whose opinion was likely to be especially persuasive to the jury, the jury was not likely to believe that the sister was "uniquely knowledgeable" about defendant's role in the offense, and at no point did any witness testify that he or she believed defendant to be guilty.

People v. Lovejoy, 235 Ill.2d 97, 919 N.E.2d 843 (2009) Other crimes evidence is admissible if relevant for any purpose other than to show the defendant's propensity to commit crimes. Other crimes evidence can be admissible to show motive to commit the crime charged, so long as the probative value of the evidence is not outweighed by the prejudicial effect.

Where the defendant was charged with the first degree murder of his stepdaughter, the trial court properly admitted, as evidence of motive, the stepdaughter's allegations that the defendant had sexually assaulted her. The court noted that the trial court weighed the probative value and prejudicial effect of such evidence, limited the testimony that was admitted, and gave a limiting instruction.

Admission of such evidence did not violate the right to confrontation under **Crawford v. Washington**, which holds that testimonial hearsay is inadmissible unless the witness is unavailable for trial and there was a prior opportunity for cross-examination. The statements fell outside the **Crawford** rule because they were admitted not to prove the truth of the matter asserted – that the defendant had assaulted the decedent – but to prove a possible motive for the murder.

Nor was **Crawford** violated where a medical examiner was allowed to testify concerning the results of toxicology testing done by an outside laboratory, where the examiner did not know the identity of the person who performed the testing or whether the equipment was in proper operating condition.

Under Illinois law, experts may both consider medical and psychological records commonly relied upon by members of their profession and testify about the contents of those records at trial. Because the medical examiner testified that it was common practice to rely on toxicological reports prepared by an outside laboratory when drawing conclusions related to the cause of death, and testified that he was trained to interpret such test results, those results were admissible. The court also noted that the statements were not admitted for the

truth of the matter asserted – that the decedent had specified levels of substances in her blood – but to explain the expert's opinion concerning cause of death.

In re Rolandis G., 232 Ill.2d 13, 902 N.E.2d 600 (2008) A statement to a law enforcement agent is "testimonial" if the objective circumstances suggest that the primary purpose is to establish or prove past events in order to identify or convict a perpetrator. A statement to law enforcement personnel is "nontestimonial" if the circumstances objectively indicate the primary purpose of the interpretation is to gather information to meet an ongoing emergency.

Where a statement is the product of questioning by police or a police agent, the objective intent of the questioner determines whether the statement was made to establish a particular fact. Where statements are not the product of law enforcement interrogation, however, the test is whether the declarant intended the statement to establish a particular fact and whether a reasonable person would have believed that his statement could be used against the defendant. When the declarant is a child, age is one of the objective circumstances to consider in determining whether a reasonable person would think that the statement would be available for use at trial.

The child welfare worker who obtained the statement of the six-year-old complainant was a police agent because: (1) she worked for a licensed advocacy center which worked with other agencies to investigate and prosecute child sexual abuse cases, (2) the worker was obligated to share any information with the police, (3) there was no evidence that the purpose of the interview was to treat the complainant, (4) the complainant was no longer in any danger from the respondent, (5) a police officer observed the interview, and (6) a copy of the victim's videotaped statement was given to the police. Because the statement was obtained through questioning and was intended to determine past facts, it was "testimonial."

The court stated that it was "not unsympathetic to the State's concern" that Crawford increases the difficulty of prosecuting child abuse cases. However, "we may not abridge constitutional guarantees simply because they are a hindrance to the prosecution of child sexual abuse crimes."

The "forfeiture by wrongdoing" doctrine holds that a defendant waives his right to confront the declarant of a hearsay statement if the declarant is unavailable at trial due to the defendant's wrongdoing. Under U.S. Supreme Court precedent, the doctrine applies only if the actions which caused the witness's unavailability were intended by the defendant to prevent the witness from testifying. Because there was no evidence that the respondent committed the crime with the intent to prevent the respondent from testifying, the "forfeiture by wrongdoing" doctrine did not apply. The fact that the respondent made the complainant "pinky swear" not to tell anyone did not show an intent to prevent the complainant from testifying where nothing in the record indicated that respondent did so in contemplation of a future trial at which the complainant would be unavailable. See also, **People v. Stechly**, 225 Ill.2d 246, 870 N.E.2d 333 (2007) (plurality opinion)(a statement is "testimonial" if it is: (1) made in a "solemn" fashion, and (2) intended to prove some fact germane to the defendant's prosecution; witnesses were clearly "agents" of law enforcement where both were mandated "reporters" who were required to report to DCFS any reason to believe that a child whom they saw in their professional capacities had been abused or neglected; trial court did not err by finding the witness to be "unavailable"; "unavailability includes child witnesses who are unable to testify because of fear"; "forfeiture by wrongdoing" doctrine applies only if the defendant intentionally procured the witness's absence, and not where some action by the defendant had the ancillary result of making the witness unavailable); **People v. Sutton**, 233 Ill.2d 89, 908 N.E.2d 50 (2009) (hearsay is "testimonial" if the circumstances objectively indicate that the primary purpose of the interrogation was to establish or prove

past events in order to identify or convict the perpetrator; whether statement is "testimonial" is a question of law to which the de novo standard of review applies; statement was made in a "solemn" fashion, as required by Illinois precedent, where it was "embedded" in the officer's subsequent police report; previously hypnotized witness was "available" for cross-examination where he was physically present at trial and cross-examination concerned prehypnotic recall).

People v. Cookson, 215 Ill.2d 194, 830 N.E.2d 484 (2005) 1. The court rejected defendant's argument that testimony admitted under 725 ILCS 5/115-10, which authorizes the admission of certain hearsay statements made by the victims of child sexual abuse, violates **Crawford v. Washington**, 541 U.S. 36 (2004). The court noted that the Confrontation Clause does not bar admission of a statement so long as the declarant is present in court to defend or explain it. Thus, **Crawford** does not apply to testimony admitted under §115-10 because the statute requires the child to be available to testify and therefore subject to cross-examination. (In finding that §115-10 requires that the child be available to testify at the proceeding, the court referred to §115-10(b)(2)(A), which states that the evidence is admissible if the child testifies at the proceeding. The court did not discuss 115-10(b)(2)(B), which holds that even if the child does not testify, the evidence is admissible if the child is unavailable and there is corroborative evidence.)

2. The court concluded that in this case, the circumstances of the statements provided sufficient indicia of reliability to be admitted under §115-10. The court rejected arguments that the 7-year-old complainant used language and exhibited a level of knowledge of sexual activity that would be unusual for a child of her age, noting that she had been exposed to "an appalling environment of prostitution and drug use."

The court also acknowledged testimony that defendant's natural father told her to say "bad things" about the defendant, and that the complainant spent a significant amount of time in the natural father's custody. The court found that such evidence did not establish lack of reliability, because the complainant readily admitted that the natural father had prompted her to speak ill of the defendant but expressly denied that he had told her to falsely claim that defendant had sexually abused her. The court also noted that the trial judge had the advantage of observing the witnesses before concluding that the accusations against defendant were not a result of the natural father's directions.

Although there was evidence suggesting that the complainant tended to confuse the defendant and her natural father, that evidence arose only at trial and therefore could not have been considered by the trial judge at the pretrial reliability hearing. In addition, at trial defendant failed to renew his objection after that evidence was admitted, the minor repeatedly referred to defendant by his first name rather than as her father (reducing the likelihood of a mistaken identification), and the minor did not vacillate concerning the identity of her abuser.

3. The court noted, however, that some of the statements occurred during an interview by a DCFS investigator and a detective, who did not videotape the interview despite the availability of videotaping equipment. The court stated, "While we believe the lack of a contemporaneous video recording does not render the interview unreliable . . ., we once again strongly admonish law enforcement personnel and social workers to record those interviews whenever possible."

People v. Patterson, 217 Ill.2d 407, 841 N.E.2d 889 (2005) 1. **Crawford** was violated when the grand jury testimony of a witness who refused to testify at defendant's trial was read to the jury. The testimony was admitted under 725 ILCS 5/115-10.2, which authorizes the

admission of hearsay statements by a declarant who refuses to testify despite a court order. Such testimony can be admitted only if: (1) the hearsay is offered on a material point, (2) the hearsay is more probative on that point than any other evidence which is reasonably available, (3) the hearsay has equivalent circumstantial guarantees of trustworthiness as traditional hearsay exceptions, and (4) the interests of justice will be served by admitting the statement. Although the **Crawford** court did not give a comprehensive definition of "testimonial," there is no question that testimony before a grand jury qualifies.

2. The court concluded, however, that **Crawford** error is subject to harmless error analysis. The court concluded that the error was harmless beyond a reasonable doubt because it could not have contributed to the conviction.

People v. McClanahan, 191 Ill.2d 127, 729 N.E.2d 470 (2000) The Confrontation Clause was violated by 725 ILCS 5/115-15, which provided that in drug prosecutions the State could use lab reports as *prima facie* evidence of the identity of a substance, unless within seven days of receiving the report the defense demanded live testimony.

Illinois Appellate Court

People v. Moore, 2023 IL App (2d) 220289 Defendant was charged with domestic violence. The complainant testified that she lived with defendant and suffered an injury on the date in question. She also admitted to making a statement to the police, but stated she could not recall anything further. The State presented her handwritten, signed statement to the police indicating that defendant physically abused her, as well as a similar verbal statement through the testimony of a police officer. The statements were admitted under 725 ILCS 5/115-10.2a. Defendant was found guilty and on appeal challenged the admission of the out-of-court statements.

Defendant first argued that the statements violated the sixth amendment's confrontation clause because, under **Crawford**, the declarant was not "available" for cross-examination due to her inability to remember details of the offense. The appellate court held the complainant was available, citing **People v. Burnett**, 2015 IL App (1st) 133610. There, as here, the complainant did not recall the details of the offense, even after confronted with a handwritten statement, but she did offer some information relevant to the elements of the offense. In this case, elements of domestic battery include physical contact of an insulting nature by a household member, and the complainant did testify that she suffered an injury, and that defendant was a household member. Therefore, she was sufficiently available for cross, and her prior statements were admissible under the sixth amendment.

The statements also qualified for admission under section 115-10.2a. They had sufficient guarantees of trustworthiness for admission where, under the totality of the circumstances analysis, and based on the four factors laid out in **People v. Bueno**, 358 Ill. App. 3d 143 (2005), the statements were made shortly after the crime, and corroborated by the marks on the complainant's neck and the fact that her apartment was in disarray. As for the notice requirement of section 115-10.2a(b), the State complied by including the statute and a reference to "all statements of witnesses" in its discovery response. Finally, the trial court did not need to make explicit findings that the statement was more probative than other evidence or that the general purposes of the statute would best be served by admission, requirements under 725 ILCS 5/115-10.2a(a), because the judge is presumed to know and apply the law.

People v. Fox, 2022 IL App (4th) 210262 No plain error occurred when the State elicited two hearsay statements made by either defendant or a co-defendant. First, a witness testified that in the aftermath of a shooting, defendant and co-defendant were gathered around a police scanner. When the name of a potential eyewitness to the shooting came over the scanner, one of the men stated "there was no way she would have seen." Second, a witness testified that when the police pulled up to the house, defendant or co-defendant shouted "they got us."

Although the admission of a hearsay statement made by a non-testifying co-defendant would be unconstitutional, no error occurred in this case. First, the statements did not implicate the confrontation clause because they were non-testimonial. In any event, the evidence was not closely balanced for purposes of the first prong of the plain error rule, and courts have found that confrontation clause violations do not arise to the type of structural errors reviewable under the second prong. See **People v. Patterson**, 217 Ill. 2d 407 (2005). Finally, the statements were admissible as excited utterances, regardless of the declarant.

People v. Feliciano, 2020 IL App (1st) 171142 Injured individual's statements to paramedics, police officer, and emergency room doctor identifying defendant as the person who had hurt him were not testimonial when the factors identified in **Davis v. Washington**, 547 U.S. 813 (2006) were considered. Specifically, the Appellate Court found that the victim was facing an ongoing emergency because he was receiving medical treatment at the time, the statements were necessary to resolve the ongoing emergency because emergency personnel needed to treat him and determine whether the perpetrator was still present at the scene, and the statements were made frantically where the victim was upset and angry when he spoke.

Further, those non-testimonial statements were admissible as spontaneous declarations even though the victim may have been injured as much as two days prior to making the statements. The elderly victim was discovered trapped under a dresser in his bedroom and had last been seen by a neighbor two days prior. He immediately named defendant as the individual who hurt him when he was discovered by his neighbor, and he repeated that identification to emergency personnel. The Appellate Court concluded that the excitement of the event predominated, despite the passage of time.

People v. Johnson, 2019 IL App (1st) 161104 The State admitted an Illinois State Police certification stating that defendant did not possess a valid FOID card. Defense counsel acquiesced in the certification's entry into evidence. The Appellate Court rejected defendant's attempt to raise the issue as plain error, finding invited error. Moreover the claim could not be raised as counsel's ineffectiveness because decisions about stipulations are strategic.

People v. Perkins, 2018 IL App (1st) 133981 The trial court abused its discretion in admitting as dying declarations two statements of identification, made by the victim of a gunshot wound to the face. To admit a statement as a dying declaration, the proponent must show: (1) the statement relates to the underlying homicide; (2) the declarant believes death is almost certainly imminent; and (3) the declarant is mentally capable of giving an accurate statement. Here, the trial court made no findings as to the declarant's belief that death was imminent. Despite the seriousness of the injury, the declarant never stated that she believed death was imminent, and nobody told the declarant that her death was imminent.

The trial court did not, however, abuse its discretion in finding the statements to be excited utterances even though they were made one to two hours after the shooting. The declarant made the statements during treatment in the ER, and while a bullet was still

lodged in her head. Under these circumstances, it is unlikely that the declarant spent the time between the incident and the statement fabricating a story, and the lapse of time did not diminish the excitement of the event.

These excited utterances were testimonial, as they were made to police officers and, with defendant already under arrest, were not elicited to address an ongoing emergency. But defendant forfeited his confrontation rights with regard to this witness. Under the forfeiture-by-wrongdoing doctrine, testimonial statements are admissible if the State proves by a preponderance of the evidence that defendant killed the declarant with the intent to prevent her from testifying. Here, the State alleged that defendant shot the declarant to keep her from testifying against him either for a violation of an order of protection or for a pending criminal damage to property case. Defendant argued that the doctrine applies only to a killing aimed at procuring the witness's testimony for the trial at which they are admitted. In **People v. Peterson**, 2017 IL 120331, the Illinois Supreme Court held that the doctrine applies to killings aimed at preventing *any* testimony, not just potential testimony at the murder trial stemming from the killing. The Appellate Court applied **Peterson** in this case and found the trial court properly found the doctrine applicable where defendant acted with intent to prevent the declarant from testifying in other matters.

People v. Zimmerman, 2018 IL App (4th) 170695 Under Illinois Rule of Evidence 801(d)(1)(B) and 725 ILCS 5/115-12, the admissibility of prior statements of identification is not limited to the witness's actual identification of the offender but also includes the "entire identification process." Regardless, the trial court did not abuse its discretion in ruling that only the prior statement of identification by the witness was admissible here and in barring evidence from two other individuals that the witness repeated the identification to them. The repeated statements would be cumulative.

Under Illinois Rule of Evidence 804(b) and the forfeiture-by-wrongdoing doctrine, prior statements by the murder victim were admissible because there was evidence of defendant's intent to kill her to prevent her from being a witness against him in child support enforcement proceedings. The court did not abuse its discretion in limiting that evidence to a few specific statements, however, where it concluded that other statements were cumulative and of limited probative value. A court is free to consider all applicable rules of evidence even where the parties limit their arguments to a specific doctrine or rule.

People v. Stevens, 2018 IL App (4th) 150871 Counsel's failure to object to admission of certified report stating that defendant did not have a concealed carry license was invited error. Counsel could have objected at the pretrial hearing where the State indicated it would seek to admit the report or at trial when the exhibit was introduced. If counsel had objected, the State could have cured any error by calling a witness to admit the report. Even if counsel's performance was deficient, there was no prejudice because the record does not show that such witness was not available.

People v. Weinke, 2016 IL App (1st) 141196 As a matter of law the State failed to meet its burden under Rule 414 of providing the court with evidence that a deposition was necessary because there was a substantial possibility that the witness would be unavailable at trial. Ill. S. Ct. R. 414. The State's written motion was "perfunctory, cursory, and without any supporting documentation."

Instead, the State relied on its oral assertions about the victim's injuries and medical condition. But none of these assertions constituted evidence. They were simply assertions. The court thus found that even if the assertions had been accurate, they did not satisfy the

rule's requirement that at least some evidence is needed to satisfy the movant's burden. Additionally, the court found that many of the State's assertions were "false, misleading, or both." The State seriously exaggerated the victim's injuries and her medical condition, as well as the source of its information.

Allowing the deposition to be taken before defendant had an opportunity to investigate the case and develop evidence gave the defense virtually no ability to fulfill its necessary adversarial function. Under these circumstances, granting the deposition was reversible error.

The court also found that the admission of the deposition violated defendant's right to confront witnesses under the federal and Illinois constitutions. Preexisting testimony is admissible if the witness is unavailable at trial and defendant had an adequate opportunity to effectively cross-examine the witness. To determine whether a defendant had an adequate opportunity for cross-examination, courts examine the motive and focus of the prior cross-examination, whether the cross was unlimited, and what counsel knew when conducting the examination.

The court found that here the motive was the same and that there was no limit placed on counsel's cross. But the focus of the cross would have been different at trial because counsel was not prepared to question whether the evidence supported defendant's guilt because he had no opportunity to prepare for the hastily convened deposition. Additionally, counsel was at a "severe informational disadvantage" due to his inability to prepare. Thus, since counsel did not have an adequate opportunity to cross-examine the witness, the use of the deposition at trial violated defendant's right to confrontation.

Defendant's conviction was reversed and remanded for a new trial.

People v. Burnett, 2015 IL App (1st) 133610 Defendant was convicted in a bench trial of violating an order of protection that had been obtained by his girlfriend. At trial, the girlfriend testified that she did not remember the events of the day in question. Despite being shown a typed statement she had made to police, she continued to state that she had no memory of the incident. Under the authority of §115-10a, the trial court admitted the witness's statement to police.

In an apparent case of first impression, the Appellate Court held that the witness was "unavailable" for purposes of §115-10a but "available" for purposes of the **Crawford** rule and the Sixth Amendment. First, the witness was deemed "unavailable" under §115–10.2a because she "persist[ed] in refusing to testify" or "testifie[d] to a lack of memory" concerning the subject matter of the prior statement. 725 ILCS 5/115-10a(c)(2),(3). Thus, the statement was admissible under §115-10.2a.

Second, **Crawford** states that a witness is "available" for Sixth Amendment purposes if she is "present at trial to defend or explain" the out-of-court statement. Because the witness answered preliminary questions and a number of questions about the offense which was described in the prior statement, the court concluded that she was "available" for purposes of **Crawford**. Thus, admission of the statement did not violate **Crawford**.

People v. Coleman, 2014 IL App (5th) 110274 The trial court properly admitted the testimony of five witnesses about hearsay statements made by the decedent, defendant's wife, that defendant wanted a divorce. This evidence was properly admissible (a) under the statutory hearsay exception for the intentional murder of a witness; (b) under the doctrine of forfeiture by wrong doing; and (c) to establish defendant's motive.

(a) Under 725 ILCS 5/115-10.6(a), a hearsay statement is admissible if it is offered against a defendant who killed the declarant to prevent her from being a witness in a criminal

or civil proceeding. The statute requires a pretrial hearing to determine the admissibility of the statements.

Here the trial court properly found at the pretrial hearing that defendant murdered his wife to prevent her from being a witness at a potential dissolution proceeding. Moreover, the statutory provision applies even though defendant had not initiated divorce proceedings.

(b) The common law doctrine of forfeiture by wrongdoing provides a hearsay exception for out-of-court statements made by an unavailable witness if the defendant intentionally prevented the witness from testifying. Here defendant intentionally prevented his wife from testifying by killing her, and thus her out-of-court statements were admissible.

(c) The deceased wife's out-of-court statements were also admissible to show defendant's motive. Her statements indicated that defendant wanted a divorce but might lose his job if he tried to obtain one. The statements thus provided a motive for killing her.

The admission of testimony about defendant's internet provider (IP) addresses did not violate his right to confrontation. The IP addresses were used to show that defendant sent the email threats that allegedly came from a third party who had a motive to harm the decedent. The IP addresses were obtained from Google's records and were kept in the ordinary course of business. Business records are created for the administration of a company's affairs, not for the purpose of providing evidence at trial. As such, they were not testimonial in nature and thus did not violate the confrontation clause.

The trial court properly admitted the testimony of an officer who reviewed Master Card statements and determined that spray paint was purchased using a credit card traced to defendant. Illinois Rule of Evidence 803(24) provides an exception to the hearsay rule and allows a receipt or paid bill to serve as *prima facie* evidence of the fact of a payment.

People v. Cleary, 2013 IL App (3rd) 110610 725 ILCS 5/115-10.2(a) creates a hearsay exception for "domestic violence prosecutions" where the statements in question were made by a person who is protected by the Domestic Violence Act of 1986 (750 ILCS 60/101). Such statements are admissible if the declarant is unavailable to testify and the statements are not covered by any other hearsay exception but have equivalent circumstantial guarantees of trustworthiness. In addition, the trial court must find that the statements are evidence of a material fact, the statements are more probative than any other reasonably available evidence, and admission of the statements will serve the general purposes of the statute and the interests of justice.

Defendant conceded that §115-10.2(a) authorized the admission of his wife's hearsay statements at his trial for murdering her, but claimed that admission of the statements violated **Crawford v. Washington**, 541 U.S. 36 (2004). Whether a statement is "testimonial" depends on its primary purpose, which is determined from the objective circumstances surrounding the statement as evidenced by the actions of both the declarant and any other party to the conversation. In **People v. Stechly**, 225 Ill. 2d 246 (2007), a plurality of the Illinois Supreme Court held that to be "testimonial," a statement must be made in a solemn fashion, and must have the primary purpose of establishing a particular fact that is relevant to a later prosecution. Under **Stechly**, if the statement is the product of law enforcement interrogation, the primary purpose is determined from the intent of the questioner. If the statement is not a product of police interrogation, the primary purpose is determined by the intent of the declarant.

The Appellate Court concluded that a majority of the Illinois Supreme Court adopted the position of the **Stechly** plurality in **In re Rolandis G.**, 232 Ill. 2d 13 (2008) and **People v. Sutton**, 233 Ill. 2d 89 (2009). The court observed, however, that in its most recent

Confrontation Clause case, the Illinois Supreme Court did not apply the **Stechly** framework. (**People v. Leach**, 2012 IL 111534). The Appellate Court also noted that the **Stechly** plurality may be inconsistent with **Michigan v. Bryant**, 562 U.S. ____, 131 S.Ct. 1143 (2011), in which the U.S. Supreme Court stated that for **Crawford** purposes the primary purpose of an out-of-court statement is determined by analyzing the objective circumstances based on the perspectives of both the declarant and the person receiving the statement.

Despite the uncertainty as to the applicable standard, the Appellate Court elected to use the **Stechly** plurality test to determine whether the statements of the decedent were testimonial. The court concluded that under **Stechly**, statements which the decedent made to family and friends about her fear of the defendant were non-testimonial and could be admitted without implicating the Confrontation Clause.

First, the statements were not made in a solemn fashion. A statement is made in solemn fashion if it is formal or if there are threats of consequences for dishonesty. Here, the statements were made to friends and family in the course of discussing her relationship with her husband, and were not made under oath, contained in any kind of formalized document, or made to law enforcement personnel or other authority figures. Under these circumstances, the statements were insufficiently solemn to satisfy the first prong of the **Stechly** test.

Second, the court concluded that a reasonable person in the declarant's situation would not have anticipated that the statements would have been transmitted to police for use in a possible future prosecution. The statements referred to defendant's threats to kill the decedent, and occurred in conversations where the decedent was discussing her relationship and why she was afraid to leave it. The court found that the statements could have been explanations for why the decedent stayed in the relationship, expressions of her feelings of helplessness, or cries for help. However, "[i]t is not axiomatic that a reasonable person would make these statements with the intent that they be transmitted to law enforcement in the event of a subsequent crime occurring." Furthermore, there did not appear to be any adverse consequences if the decedent was being dishonest.

People v. Nelson, 2013 IL App (1st) 102619 At defendant's jury trial for aggravated kidnaping and aggravated criminal sexual assault, the State presented evidence that Cellmark, a private laboratory, extracted a DNA profile from a rape kit taken from the victim at the hospital. The DNA profile developed by Cellmark was subsequently matched by a different expert to the defendant's profile, which was contained in a database in Illinois.

The only evidence concerning the Cellmark report was the testimony of a Cellmark supervisor, who took cuttings from the rape kit, reviewed the data and documentation, and authored the report in this case. The witness testified that several people worked on various stages of extracting the DNA from the rape kit, and that much of the work was done by robotic instrumentation. The witness also testified that the controls utilized by Cellmark were in proper order and working correctly in this case.

The Appellate Court concluded that defendant's Sixth Amendment right to confrontation was not violated by admission of the supervisor's testimony concerning the Cellmark report. After reviewing U.S. Supreme Court precedent the court found the evidence non-testimonial under Justice Thomas's rationale in **Williams**, which required forensic reports to be formalized and sufficiently solemn. Furthermore, the evidence was not "testimonial" under the plurality's definition in **Williams** because it did not accuse a particular person of a crime.

Alternatively, the court concluded that a supervisor who participated in the DNA extraction process may testify concerning the process by which the DNA profile was

developed. The court concluded that the case involves an issue which has been left open by the U.S. Supreme Court - where DNA evidence is developed by a team, how many members of the team must testify in order to satisfy the defendant's confrontation rights. Without explaining its holding, the court concluded that the testimony of a supervisor who actually participated in the DNA testing is sufficient to satisfy the defendant's confrontation rights and that the State was not required to call other members of the team.

People v. Jenkins, 2013 IL App (4th) 120628 The forfeiture by wrongdoing exception to the hearsay rule applies where a hearsay statement is offered against a party which has engaged or acquiesced in wrongdoing that was intended to, and did, procure the declarant's unavailability as a witness. The exception applies only where the party in question acted with the intent to make the declarant unavailable. The mere fact that certain actions resulted in the unavailability of the witness does not trigger the forfeiture by wrongdoing exception.

The court concluded that the trial judge did not act contrary to the manifest weight of the evidence by concluding that a defendant who shot the declarant during an armed robbery did not act with the intent to make the declarant unavailable as a witness. Under the "manifest weight of evidence" standard of review, a party seeking to overturn the trial judge's finding must do more than merely argue that inferences which favor its position could be drawn from the evidence. "Even if one *may* or *can* reasonably infer that defendant had the intent to procure [the declarant's] unavailability as a witness, it does not follow that the opposite inference, that defendant lacked such an attempt, is unreasonable or against the manifest weight of the evidence." The court also noted that the factual representations made in the State's brief were not included in its offer of proof at trial. Given the State's offer of proof in the lower court, the trial judge did not act against the manifest weight of the evidence by finding that the forfeiture by wrongdoing exception did not apply.

The court concluded that the manifest weight of the evidence standard applied because the contentions between the parties were factual: (1)whether the evidence was such that the trial court could infer only that the declarant believed his death to be imminent at the time of the statement, and (2) whether the evidence was such that the trial court could infer only that defendant acted with the intent to make the declarant unavailable as a witness. The *de novo* standard of review would apply only if the issues concerned legal disputes about the applicability of the hearsay exceptions in light of uncontested facts.

People v. Vannote, 2012 IL App (4th) 100798. No confrontation-clause problem exists simply because a witness's memory precludes him from being cross-examined to the extent the examiner would have liked. Because the witness was available for cross-examination and was cross-examined, there was no violation of defendant's constitutional right to confrontation despite the witness's claim of no memory of the events.

Cook, J., dissented.

The recorded statement of the child witness was testimonial evidence and inadmissible due to the absence of an opportunity to cross-examine. Although a gap in the recollection of a witness does not necessarily preclude the opportunity for effective cross-examination, there was more than a gap here. The witness had no recollection of the events or of the recorded examination. Unlike an adult witness who can be discredited by his lack of memory, a child's inability to remember does not discredit the witness. Due to normal developmental limitations, child witnesses are susceptible to forgetting details when there is substantial delay between the event and the request to recall it at trial. The State was able to take advantage of the witness's inability to recall by portraying him to the jury as emotionally distraught. Although the witness was able to answer "yes" or "no" to questions

by the defense, a jury may conclude in such circumstances that the answers are those of the interrogator, and the prosecutor argued to the jury that the witness's answers on cross-examination were in fact worthless.

The recorded statement was also inadmissible because it was not proved to have been accurately recorded. The recording device had a known malfunction that had caused it to skip on previous recordings. The most important part of the interview, which preceded the witness's statement that defendant touched him, was missing, providing no answers to the question of whether the examination was leading or open-ended.

People v. Richter, 2012 IL App (4th) 101025 A statement made by an unavailable witness, identified in §201 of the Illinois Domestic Violence Act as a person protected by that Act, may be admitted as a statutory exception to the rule against hearsay in "domestic violence prosecutions," where the statement is not specifically covered by any other hearsay exception but has equivalent circumstantial guarantees of trustworthiness, if the court determines: (1) the statement is offered as evidence of a material fact; (2) the statement is more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts; and (3) the general purposes of the statutory exception and the interests of justice will best be served by the admission of the statement into evidence. 725 ILCS 5/115-10.2a.

The trial court acted well within its discretion in allowing statements made by the mother of defendant's children to her friends, family members and co-workers to be admitted in defendant's prosecution for her murder based on its consideration of the **Smith** factors. The Appellate Court rejected the defense argument that the statements were unreliable because the declarant had a motive to portray defendant as an unfit parent in anticipation of a custody fight over their children. None of her statements pertained to defendant's fitness as a parent, and they would have been excluded as prior consistent statements at a custody hearing.

Only testimonial hearsay implicates the Confrontation Clause. The Appellate Court held that a statement does not constitute testimonial hearsay unless there is government involvement in eliciting or receiving the statement. The court recognized that a defendant cannot be denied his right to confrontation where the declarant uses a third party as a mere conduit to incriminate defendant. Because none of the statements admitted at defendant's trial were made to government officials, no Confrontation Clause violation occurred. The declarant volunteered the statements to friends, family members and co-workers "for a host of reasons that had nothing to do with ensuring defendant was incarcerated but, instead, had everything to do with her concern that the defendant might kill her."

People v. Burney, 2011 IL App (4th) 100343 The confrontation clause bars the admission of out-of-court testimonial statements unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant. **Crawford v. Washington**, 541 U.S. 36 (2004). "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." **Davis v. Washington**, 547 U.S. 813, 822 (2006).

To determine whether the primary purpose of the interrogation is to enable the police to meet an ongoing emergency, a court must "objectively evaluat[e] the statements and

actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs. The existence of an emergency or the parties' perception that an emergency is ongoing is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial because statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirement of confrontation." **Michigan v. Bryant**, ___ U.S. ___, 131 S.Ct. 1143, 1162 (2011).

The court concluded that statements made by an elderly woman to the police when they responded to a report that an intruder had forced his way into her home were not testimonial. The circumstances of the encounter as well as the statements and actions of the woman and the interrogating officer objectively indicate that the primary purpose of the interrogation was to enable the police to meet an ongoing emergency. At the time that the statements were made, the suspect had not been found. The woman was upset and shaking, making it likely that she did not have the primary purpose to establish or prove past events relevant to a future prosecution. Nothing indicates that the interrogation was structured. The responses focused on what happened and what the intruder was wearing. This was not a situation where the officer, with pen in hand after the emergency had ended and reports were being contemplated and prepared, asked the victim to recount the entire sequence of events.

People v. Dobbey, 2011 IL App (1st) 091518 Testimonial statements may be admitted into evidence against an accused only when: (1) the witness is unavailable to testify; and (2) the defendant had a prior opportunity to cross-examine the witness. A statement is testimonial when its primary purpose is to establish or prove past events potentially relevant to a later criminal prosecution. Statements are not testimonial when the circumstances of the encounter, as well as the statement and the actions of the witness and the police, objectively indicate that the primary purpose of the interrogation is to assist the police to meet an ongoing emergency. **Michigan v. Bryant**, __ U.S. __, 131 S.Ct. 1143, ___ L.Ed.2d ___ (2011).

Bryant did not address whether this same test applies where statements are made to nonofficial individuals. Nonetheless, the court applied this same analysis, and concluded that the statement of a shooting victim was not testimonial, even though it was made to a witness who was present during the shooting but did not see the shooter. The statement was made when the declarant and the witness were in an exposed public gas station, prior to the arrival of emergency personnel, as the declarant was being dragged from their vehicle after suffering a gunshot wound to the chest. The primary purpose of the statement was to respond to an ongoing emergency. Although they had driven a few blocks from the scene, it was possible that the shooter had followed them and still posed a threat. The declarant was mortally wounded and in serious pain and could not have had as his primary purpose to establish or prove past events relevant to a future prosecution. The informality of the encounter and the absence of solemnity shows that the declarant would not have been alerted to the possible future prosecutorial use of his statements.

People v. Connolly, 406 Ill.App.3d 1022, 942 N.E.2d 71 (3d Dist. 2011) An out-of-court statement made to a law enforcement official is not testimonial when the circumstances objectively indicate that the primary purpose of any questioning was to address an ongoing emergency. Factors to be considering in deciding whether the interrogation was to meet an ongoing emergency are: (1) whether the purpose was to determine a past fact or ascertain an ongoing event; (2) whether the situation could be described as an emergency; (3) whether

the nature of the questions focused on the present or on the past; and (4) the level of formality involved.

The statements by defendant's wife were not testimonial because the statements were made while the police addressed an ongoing emergency. Defendant's neighbor called the police when she observed defendant and his wife screaming and yelling at each other as defendant held their son. The police arrived on the scene five to seven minutes after the dispatch and spoke with defendant's wife who appeared nervous, upset, and agitated. Defendant's wife reported that defendant had battered her, had set their son in the street, and then had left with the son. The police questioned other witnesses to assess the ongoing situation, and then proceeded to locate defendant and the child, who was returned to the wife.

People v. Martin, 408 Ill.App.3d 891, 946 N.E.2d 990 (2d Dist. 2011) Under 725 ILCS 5/115-10.1, an out-of-court statement may be admitted if it: (1) is inconsistent with the declarant's testimony at trial, (2) is the subject of cross-examination of the declarant, (3) was made under oath or described an event of which the witness had personal knowledge, and (4) was written or signed by the witness, acknowledged under oath, or recorded electronically.

The prior statement need not directly contradict the trial testimony in order to be admitted. Instead, the term "inconsistent" includes evasive answers, silence, or changes in position. "One of the policies underlying §115-10.1 . . . is to protect parties from 'turn coat' witnesses who back away from a former statement made under circumstances indicating that it was likely to be true." (**People v. Tracewski**, 399 Ill.App.3d 1160, 927 N.E.2d 1271 (4th Dist. 2010)).

The trial court properly applied §115-10 to admit a written statement of the complainant, who claimed at trial that she had been drinking on the night of the offense and did not recall any incident with the defendant. In the written statement, which had been prepared at the request of the arresting officers, the complainant stated that defendant grabbed her arm while she was driving and then hit her in the face. At trial, the complainant did not recall talking to police on the night of the offense. However, she identified the document as being in her handwriting.

The court concluded that the written statement contradicted the complainant's claim that she was unable to recall the incident, and noted that the trial court found that the complainant was being evasive at trial. Furthermore, the written statement explained events which were within the witness's personal knowledge when the statement was made, and the witness acknowledged making the statement by identifying the handwriting. Finally, the complainant was subject to cross-examination because she testified and responded to defense counsel's questions, although she was unable to recall the event. "[A] witness who appears and is able to testify is not unavailable for cross-examination simply because he or she cannot recall some events."

Under **Crawford v. Washington**, a testimonial statement by an unavailable witness is inadmissible unless the defendant had a prior opportunity for cross-examination. However, where the declarant appears for cross-examination at trial, the Confrontation Clause does not restrict use of her prior testimonial statements.

The court found that the factors leading to the conclusion that the complainant was available for cross-examination under §115-10 apply equally to the **Crawford** inquiry. Thus, **Crawford** is satisfied where a witness appears, answers questions, and is cross-examined, even if she is unable to remember some events.

Because the witness's out-of-court statement was properly admitted, defendant's convictions for aggravated battery and domestic battery were affirmed.

People v. Garcia-Cordova, 2011 IL App (2d) 070550-B A witness is available for cross-examination where she attempts to answer questions, but states that she either does not remember or does not know the answers. Gaps in a witness's memory do not render her unavailable for cross-examination.

The court also rejected the argument that under **People v. Kitch**, 239 Ill.2d 452, 942 N.E.2d 1235 (2011), a complainant appears for cross-examination only if his or her testimony is accusatory. Similarly, the court rejected the argument that a complainant who does not recall making a statement to police must be confronted with that statement by the prosecution. The court also stated that where a witness appears at trial and submits to cross-examination, no confrontation issue arises even if the witness fails to testify concerning his or her out-of-court statement that is admitted into evidence.

Because the seven-year-old declarant testified under oath, made an in-court identification of the defendant, and recalled speaking with investigators concerning the incident, she was "available" for cross-examination although she testified that she could not remember or did not know the answers to several questions asked on direct examination. The court also noted that for tactical reasons defense counsel chose not to cross-examine the declarant; however, the witness could have been cross-examined about the answers she gave and her lack of memory.

People v. Fillyaw and Parker, 409 Ill.App.3d 302, 948 N.E.2d 1116 (2d Dist. 2011) Admission of a nontestifying co-defendant's admission inculpating the defendant in the offense violates not only a defendant's federal constitutional right to confrontation, but also Illinois hearsay rules. Therefore, Fillyaw's statement implicating Parker in the commission of the offense was inadmissible against Parker. Although the jury was instructed to give separate consideration to each defendant, that any evidence limited to one defendant should not be considered as to the other, and that a statement made by one defendant may not be considered as to the other, it was given no contemporaneous instruction to disregard the statement when considering Parker's guilt. These instructions were insufficient to remedy the state law error; only complete redaction of all references to Parker would suffice.

The admission of this evidence was plain error. Because the error implicated defendant's due process and confrontation clause rights, it necessarily affects substantial rights and satisfies the second prong of the plain-error analysis. The seriousness of the error was compounded by the repeated references to the statement at trial and in the prosecutor's argument to the jury, the admission of the statement as substantive evidence, and the fact that a copy of the statement accompanied the jury during its deliberations.

People v. Hampton, 406 Ill.App.3d 925, 941 N.E.2d 228 (1st Dist. 2010) Admission of testimonial hearsay violates the accused's sixth amendment right to confrontation unless the declarant is unavailable and the accused had the earlier opportunity to cross-examine the declarant. **Crawford v. Washington**, 541 U.S. 36 (2004). One who obtains the absence of a witness by wrongdoing, however, forfeits the constitutional right to confrontation. To invoke this doctrine of forfeiture by wrongdoing, the State must prove by a preponderance of the evidence that the defendant intended by his actions to procure the absence of the witness. Any conduct by an accused intended to render a witness against him unavailable to testify is wrongful and may result in forfeiture of the accused's privilege to confront the witness. The doctrine also applies when defendant acquiesces in wrongdoing intended to procure the unavailability of the declarant as a witness. His active participation in the wrongdoing is not required.

At defendant's trial, the State called an alleged accomplice as a witness. The accomplice invoked his fifth amendment privilege when asked questions related to the offense and the court ultimately admitted the accomplice's prior statement pursuant to 725 ILCS 5/115-10.2 (admissibility of prior statements when witness refused to testify despite a court order to testify). On appeal, the State agreed that admission of the statement violated **Crawford**, but argued that the defendant forfeited his right to claim a violation of his right to confrontation because he wrongfully procured the silence of the witness. The Appellate Court remanded for a hearing on the claim of forfeiture by wrongdoing.

Following remand, the Appellate Court held that the State proved by a preponderance of the evidence that defendant engaged in conduct intended to render a witness unavailable to testify against him at trial. Defendant mailed a letter to the witness four days after defendant's trial began, informing the witness that he would be called to testify and repeatedly telling the witness to "plead the fifth." In the letter, the defendant directed the witness to call defendant's mother. Even though the witness did not receive the letter, the witness did call the defendant's mother and on multiple occasions she encouraged him to "plead the fifth," and coached him how to lie under oath at defendant's trial. The recorded conversations between the witness and the defendant's mother also supplied evidence that the witness was in communication with defendant about his being called as a witness. Because the record supported the trial court's finding that defendant and his mother engaged in a concerted effort to influence the witness not to testify, the Appellate Court concluded that it was not necessary for the State to show that the defendant was the actual cause of the decision of the witness not to testify.

People v. Johnson, 406 Ill.App.3d 114, 940 N.E.2d 264 (1st Dist. 2010) A DNA analyst, who worked as the laboratory director for Cellmark, testified to the lab process performed to create a DNA profile from a swab recovered from the scene of the crime, based on her review of notes and documentation in the lab folder. She testified that Cellmark was an accredited laboratory and proper procedures were followed with the appropriate control tests. An Illinois State Police forensic scientist then compared the profile prepared from the swab by Cellmark to the DNA profile obtained from a buccal swab taken from the defendant, and concluded that the profiles matched to a reasonable degree of scientific certainty.

Relying on **People v. Williams**, 238 Ill.2d 125, ___ N.E.2d ___, 2010 WL 2780344 (2010), the court concluded that the Cellmark analyst's testimony did not constitute testimonial hearsay because it was not offered for its truth but only as a basis for the experts' opinions that proper procedures were followed in the analysis and that the profiles matched. As in **Williams**, the court concluded that **Melendez-Diaz v. Massachusetts**, 557 U.S. ___, 129 S.Ct. 2527 (2009), is distinguishable because the Cellmark witness presented more than a bare-bones statement about the procedures employed at Cellmark.

As in **Williams**, the testimony of the Cellmark witness was not inadmissible on the ground that the State failed to prove that the Cellmark equipment was functioning properly at the time that the tests were performed. The Cellmark witness was the laboratory director and testified about Cellmark's accreditation and procedures. Any challenge to her testimony went to its weight, rather than its admissibility.

People v. Antonio, 404 Ill.App.3d 391, 935 N.E.2d 540 (1st Dist. 2010) **Crawford v. Washington**, 541 U.S. 36, 55 (2004), identified business records as among the well-established hearsay exceptions that by their nature are not testimonial and subject to the Sixth Amendment cross-examination requirement.

Relying on 725 ILCS 5/115-5.1, the Appellate Court concluded that reports of postmortem examinations are business records that may be admitted without the

requirement of an opportunity to cross-examine the declarant. Section 115-5.1 provides in pertinent part that "the records of the coroner's medical or laboratory examiner summarizing and detailing the performance of his or her official duties in performing medical examinations upon deceased persons or autopsies, or both, and kept in the ordinary course of business of the coroner's office, duly certified by the county coroner or chief supervisory coroner's pathologist or medical examiner, shall be received as competent evidence in any court in this State, to the extent permitted by this Section."

Because postmortem examinations are business records, a medical examiner properly testified to the results of examinations conducted by another medical examiner and a forensic anthropologist. The medical examiner who performed the autopsy of a decomposed, headless body found no trauma other than dismemberment, and could not determine the cause or manner of death. The anthropologist examined the skeletal remains, found no antemortem injuries, and also could not determine a cause of death.

Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S.Ct. 2527, ___ L.Ed.2d ___ (2009), did not change this result. The United States Supreme Court concluded that reports of experts who tested controlled substances were comparable to affidavits offered to prove a fact at issue, and therefore among the core class of testimonial statements for which cross-examination was required. In contrast, the reports of the medical examiner and the anthropologist reached no conclusion as to the cause and manner of death, and did not prove the identity of the victim. There was little or nothing to confront in either report.

People v. McNeal, 405 Ill. App. 3d 647, 955 N.E.2d 32 (1st Dist. 2010) Admission of the testimony of the nurse regarding the triage notes did not violate the Sixth Amendment Confrontation Clause because the notes were not testimonial hearsay. To determine whether hearsay is testimonial, the focus is on whether, at the time the statement was made, the declarant was acting in a manner analogous to a witness at trial, describing or giving information regarding events that had previously occurred. When the statement is the product of questioning by persons other than law enforcement personnel, the proper focus is the intent of the declarant. The inquiry is whether the objective circumstances would lead a reasonable person to conclude that the statement would be used against the defendant.

The court considered the declarant to be the nurse who prepared the triage notes and concluded that because her intent was to gather information for treatment and not prosecution, the notes were not testimonial.

People v. Duff, 374 Ill.App.3d 599, 872 N.E.2d 46 (1st Dist. 2007) 1. As a matter of first impression, the court held that a co-defendant's guilty plea is "testimonial" under **Crawford**. The court found that a guilty plea is tantamount to a confession, and noted that confessions of a co-defendant are clearly testimonial.

Thus, a co-defendant's guilty plea cannot be admitted as evidence of the defendant's guilt unless there is an opportunity to cross-examine the co-defendant.

2. The court rejected the State's argument that **Crawford** did not apply because the guilty plea was used merely to impeach the testimony of the defense witness, and not as evidence of the defendant's guilt. "The State's position in this case borders on the frivolous."

3. In the course of its opinion, the court noted that because defense counsel raised only a general objection, the **Crawford** objection could be deemed to have been waived. A general objection raises only a question of relevance, and generally waives other issues unless the grounds for the objection were clear from the record, trial counsel was ineffective, or there was plain error.

People v. Spicer, 379 Ill.App.3d 441, 884 N.E.2d 675 (1st Dist. 2007) An elderly woman's statement to an emergency room doctor - that she had been "tied and raped" - was "testimonial." The declarant was speaking about a past event, had refused medical treatment at the time of the incident, and was not taken to the hospital until several hours later, after she became upset at police questioning. The statement was clearly not a cry for help against an existing physical threat, as it was made in a hospital while the declarant was safe and in the absence of any present emergency. Finally, there was nothing in the record to suggest that the victim was "frantic."

People v. Feazell, 386 Ill.App.3d 55, 898 N.E.2d 1077 (1st Dist. 2007) As a matter of plain error, **Crawford** was violated at a trial for first degree murder where a detective testified that while interrogating the defendant, he discussed statements made by a co-defendant who did not testify at defendant's trial. The co-defendant's hearsay statements were a "powerful force for the State" and "an integral part" of the State's case, because they directly impeached defendant's version of events and "severely contradicted" defendant's testimony. In addition, without the inadmissible testimony there would have been no evidence to contradict the defendant's version of events and no direct evidence to show that she knew the co-defendant had a weapon.

People v. Brown, 363 Ill.App.3d 838, 842 N.E.2d 1141 (1st Dist. 2006) 1. The court accepted the State's concession that 725 ILCS 5/115-10.2(a), which authorizes the admission of reliable hearsay statements by a declarant who refuses to testify despite a court order, violates **Crawford** because it permits the admission of testimonial hearsay without an opportunity for cross-examination. However, because the possibility of cross-examination is one of four factors traditionally considered by courts in determining whether such evidence is reliable, and a court could exclude a statement on the basis that there had been no cross-examination, §115-10.2 was not facially invalid.

The court also noted that §115-10.2 has been amended to provide that statements are admissible only if made under oath and subject to cross-examination.

2. Because the statute is not unconstitutional on its face, the **Crawford** error was subject to harmless error analysis. However, the error was not harmless in this case because the statements contributed to the defendant's conviction.

People v. Miller, 363 Ill.App.3d 67, 842 N.E.2d 290 (1st Dist. 2005) 725 ILCS 5/115-12 provides that a statement of prior identification is admissible as substantive evidence if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is one identifying a person after perceiving him. The court concluded that a declarant is available for cross-examination, both for purposes of §115-12 and under **Crawford v. Washington**, if he or she is "available at trial, under oath, and willing to testify." The declarant is not "unavailable" for cross-examination merely because he denies making the out-of-court statement.

§19-10(c)
Examples: Admissible Testimony

Illinois Supreme Court
People v. Chatman, 2024 IL 129133 The common-law doctrine of forfeiture by wrongdoing serves as an exception to the hearsay rule and the confrontation clause. In Illinois, the

doctrine is codified in Illinois Rule of Evidence 804(b)(5). Under that rule, an out-of-court statement may be admitted substantively against a party who has "engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." For the doctrine to apply, the proponent of the evidence must demonstrate by a preponderance of the evidence that the declarant is unavailable and that reasonable, good-faith efforts were made to procure the witness's attendance. In confirming the applicability of a good-faith requirement, the Supreme Court overruled the contrary holding in **People v. Golden**, 2021 IL App (2d) 210716.

Here, defendant argued that the State failed to meet the good-faith requirement. Defendant was charged with first degree murder in the shooting death of Ricky Green. The incident in question occurred when Green, defendant, and another man fled from a vehicle stop. Defendant shot Green while fleeing, but defendant was not immediately charged with his murder. Subsequently, however, a man named Dee Collins was arrested on an unrelated traffic warrant and provided police with a video-recorded statement about the shooting. Specifically, Collins said he had been with defendant the morning after Green's shooting and that defendant admitted shooting and killing Green after stealing Green's gun from him.

At defendant's murder trial, the State was permitted to admit Collins's out-of-court statement under the forfeiture-by-wrongdoing doctrine. Collins originally maintained contact with the police but later moved away and stopped responding. The trial court found that the State made reasonable, good-faith efforts to secure Collins's attendance at trial, evidenced by posts on a local law-enforcement message board, attempting to text and call Collins without success, and visiting his former addresses without making contact.

The Supreme Court affirmed over defendant's assertion that the State should have done more to secure Collins's presence at trial. The record demonstrated that Collins had received threats from defendant's family and friends. He moved to Iowa to escape those threats and, while he initially stayed in contact with the police, his whereabouts later became unknown. The police attempted to call Collins, text him, and locate him at his former addresses and at his brother's address, all to no avail. The police made a posting on a law enforcement information board accessible by local agencies, and the posting was viewed hundreds of times without any contact being reported. Ultimately, it appeared Collins did not want to be found. While the State's efforts to locate Collins might not have been extraordinary, they were reasonable under the totality of the circumstances. Thus, there was no error in admitting Collins's video-recorded statement at defendant's trial.

People v. Leach, 2012 IL 111534 Business records will rarely qualify as testimonial statements because they are prepared in the routine course of the operation of the business activity or the public office or agency, rather than for the purpose of admission against a criminal defendant.

Under state law, a coroner must conduct an investigation into the circumstances of a death if any one of five enumerated conditions exists. 55 ILCS 5/3-3013. The medical examiner's office does not act as an agent of law enforcement, but is charged with protecting the public health by determining the cause of a death. An autopsy report is prepared in the normal course of operation of the medical examiner's office, to determine the manner and cause of death, which, if determined to be homicide, could result in charges being brought. Even where foul play is suspected, an autopsy might exonerate a suspect. Autopsy reports are not usually prepared for the sole purpose of litigation, even though they might eventually be used in litigation of some sort.

Thus the primary purpose of preparing an autopsy report is not to accuse a targeted individual of engaging in criminal conduct or to provide evidence in a criminal trial. Neither

is an autopsy report certified or sworn in anticipation of its being used as evidence. Considering the split of opinion among the justices of the United States Supreme Court, the Illinois Supreme Court concluded that, while it was not prepared to say that an autopsy report could never be testimonial in nature, autopsy reports prepared in the normal course of business of a medical examiner's office are nontestimonial. They are not rendered testimonial merely because the examiner conducting the autopsy is aware that the police suspect homicide and that a specific person might be responsible.

People v. Anderson, 113 Ill.2d 1, 495 N.E.2d 485 (1986) A psychiatric expert may reveal, on direct examination, the contents of reports and defendant's statements on which he relied in arriving at his conclusion. Such testimony is not hearsay; the reports and statements are not offered for their truth, but for the limited purpose of explaining the basis of the opinion.

People v. Silagy, 101 Ill.2d 147, 461 N.E.2d 415 (1984) At defendant's trial for murder, a doctor stated on cross-examination that another psychiatrist had previously diagnosed the defendant as not being sexually dangerous. The Supreme Court held that the testimony was not hearsay, because it was not elicited to show the truth of the matters asserted therein. Instead, the prior diagnosis was elicited for the purpose of impeaching the testifying doctor.

People v. Ransom, 65 Ill.2d 339, 357 N.E.2d 1164 (1976) During defendant's murder trial, a physician was allowed to testify that the body on which he conducted an autopsy had a tag bearing the name "Ernest Tiller." Defendant contended that such testimony was inadmissible hearsay.

The Supreme Court held that the testimony was not hearsay because it was not offered to prove that the body to which the tag was attached was that of Ernest Tiller; rather, the testimony was offered to show that the body was the one delivered to the funeral home and identified by its manager as that of Ernest Tiller.

Illinois Appellate Court

People v. Moore, 2023 IL App (2d) 220289 Defendant was charged with domestic violence. The complainant testified that she lived with defendant and suffered an injury on the date in question. She also admitted to making a statement to the police, but stated she could not recall anything further. The State presented her handwritten, signed statement to the police indicating that defendant physically abused her, as well as a similar verbal statement through the testimony of a police officer. The statements were admitted under 725 ILCS 5/115-10.2a. Defendant was found guilty and on appeal challenged the admission of the out-of-court statements.

Defendant first argued that the statements violated the sixth amendment's confrontation clause because, under **Crawford**, the declarant was not "available" for cross-examination due to her inability to remember details of the offense. The appellate court held the complainant was available, citing **People v. Burnett**, 2015 IL App (1st) 133610. There, as here, the complainant did not recall the details of the offense, even after confronted with a handwritten statement, but she did offer some information relevant to the elements of the offense. In this case, elements of domestic battery include physical contact of an insulting nature by a household member, and the complainant did testify that she suffered an injury, and that defendant was a household member. Therefore, she was sufficiently available for cross, and her prior statements were admissible under the sixth amendment.

The statements also qualified for admission under section 115-10.2a. They had sufficient guarantees of trustworthiness for admission where, under the totality of the

circumstances analysis, and based on the four factors laid out in **People v. Bueno**, 358 Ill. App. 3d 143 (2005), the statements were made shortly after the crime, and corroborated by the marks on the complainant's neck and the fact that her apartment was in disarray. As for the notice requirement of section 115-10.2a(b), the State complied by including the statute and a reference to "all statements of witnesses" in its discovery response. Finally, the trial court did not need to make explicit findings that the statement was more probative than other evidence or that the general purposes of the statute would best be served by admission, requirements under 725 ILCS 5/115-10.2a(a), because the judge is presumed to know and apply the law.

People v. Hudson, 2023 IL App (1st) 192519 Police had a search warrant for defendant's residence. They were looking for a man named Tommie Williams, who was suspected of manufacturing and distributing cannabis, and who was known to stay at the home. At the home, however, the police did not find Williams or cannabis. Instead, they found a gun in a bedroom closet. Defendant was present at the time and was charged with armed habitual criminal.

At trial, the court denied defendant's request to allow testimony about the contents of the search warrant, specifically that the target was Williams, not defendant, and that the suspected offense involved cannabis, not a weapon. Evidence at trial was that the police discovered the gun in a bedroom closet, a man's clothing was in that bedroom, mail addressed to defendant was found in the bedroom, and defendant had medication on the dresser in the bedroom. Additionally, an officer testified that defendant admitted that the gun was his. Defendant denied making that statement and presented evidence that he actually lived in the basement of the home, including testimony of other residents, as well as his ID card and voter registration.

During jury deliberations, the jurors sent out a note asking what the warrant was for. The court refused counsel's request to inform the jury of the target and contents of the warrant and instead responded that the police had a "lawful warrant" and "what the warrant was for is not in evidence and should not be considered." The jury found defendant guilty.

The trial court abused its discretion when it applied the hearsay doctrine to exclude the contents of the search warrant. Defendant was not seeking to admit the specifics of the warrant for the truth of the matter asserted therein, but rather to show the course of the investigation. The contents should have been admitted here to prevent the jury from drawing improper inferences about the reason for the search of defendant's home. Given the relatively thin evidence of defendant's knowing possession of the gun, coupled with the jury's specific question about the contents of the warrant, the appellate court concluded that defendant was prejudiced by the court's refusal to admit the warrant's contents. The matter was reversed and remanded.

The dissenting justice would have affirmed on the basis that the existence of the warrant was admissible to show that the police had the authority to enter the home, but the contents of the warrant were not relevant to any fact at issue and thus were not admissible.

People v. Chatman, 2022 IL App (4th) 210716 Under Illinois Rule of Evidence 805(b)(5), an out-of-court statement is not barred by the hearsay rule where the party against whom the statement is offered has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. This is commonly known as the "forfeiture by wrongdoing" doctrine.

Here, the State met its burden of showing by a preponderance of the evidence that the witness, Collins, was unavailable, as defined in Illinois Rule of Evidence 804(a). The State

asserted that Collins could not be located near the time of defendant's trial, and thus he could not be served or otherwise compelled to come to court. Thus, under 804(a)(5), the State was required to show it had made good-faith reasonable efforts to procure Collins's attendance. This is a fact-specific determination, which the State satisfied with evidence that the police had put out a notice to other law enforcement that they were looking for Collins, the police attempted to contact Collins on his phone and at several potential addresses, and the police had contacted Collins's family members in an effort to find him. The police knew that Collins had relocated at least once, had disabled his social media accounts, and had obtained a new phone in an effort to protect himself from people who had threatened him because of his cooperation in this case. Under the totality of the circumstances, the State's efforts to locate Collins and procure his attendance were reasonable.

Defendant did not challenge the trial court's finding that he engaged or acquiesced in the wrongdoing which caused Collins's unavailability. Because the appellate court found that the State had established Collins's unavailability, it affirmed the trial court's decision to admit Collins's out-of-court statement against defendant.

People v. Fox, 2022 IL App (4th) 210262 No plain error occurred when the State elicited two hearsay statements made by either defendant or a co-defendant. First, a witness testified that in the aftermath of a shooting, defendant and co-defendant were gathered around a police scanner. When the name of a potential eyewitness to the shooting came over the scanner, one of the men stated "there was no way she would have seen." Second, a witness testified that when the police pulled up to the house, defendant or co-defendant shouted "they got us."

Although the admission of a hearsay statement made by a non-testifying co-defendant would be unconstitutional, no error occurred in this case. First, the statements did not implicate the confrontation clause because they were non-testimonial. In any event, the evidence was not closely balanced for purposes of the first prong of the plain error rule, and courts have found that confrontation clause violations do not arise to the type of structural errors reviewable under the second prong. See **People v. Patterson**, 217 Ill. 2d 407 (2005). Finally, the statements were admissible as excited utterances, regardless of the declarant.

People v. Price, 2021 Il App (4th) 190043 The trial court did not err in allowing the State to introduce evidence of the content of deleted text messages between defendant and his brother on the night of the murder. Text messages are authenticated in the same manner as documentary evidence. Here, defendant's brother testified that he recalled texting defendant on the date in question and confirmed the content of the messages, generally. While defendant's brother said he did not recall the exact wording of the messages, any uncertainty goes to weight, not admissibility. The testimony of the author of a text message is generally sufficient to authenticate it. And, here the State also introduced records from Sprint, defendant's cell phone carrier, which corroborated that messages were exchanged between defendant's cell number and his brother's on the night in question.

Further, the text messages were not hearsay where they either directed defendant to take some action ("delete this"), thus showing why defendant acted as he did, and provided context for defendant's actions, thereby showing his state of mind, specifically that he believed the five deleted messages were incriminating. And, the messages were not offered for the truth of the matter asserted where defendant asked his brother for advice about cleaning gunshot residue, and his brother responded with directions on what to do, including to delete the messages.

Finally, although the court had initially ruled prior to trial that the messages would not be admitted, it did not err by reversing its ruling on the motion during trial. A pretrial ruling on a motion *in limine* is an interlocutory order and is not binding. Such rulings are always subject to reconsideration during trial. And, while defendant claimed he was prejudiced by the court's reversal of its pretrial ruling, defendant did not explain how.

People v. Saulsberry, 2021 IL App (2d) 181027 The Appellate Court rejected defendant's assertion that improper evidence was admitted at his murder trial. First, defendant argued improper other crimes evidence was admitted when an accomplice testified that prior to the shooting, defendant had been "hunting" for opposing gang members. The Appellate Court questioned whether this was even other crimes evidence because it described defendant's behavior leading up to the crime itself. Regardless, the evidence was admissible to show motive.

Second, a gang member witness testified that, after the murder, when defendant entered a room with a gang leader, the leader told the witness to shake defendant's hand because he was the one who "took care of it." The Appellate Court found the handshake and the comment were nonhearsay, admitted not for the truth of the matter asserted but rather to show the effect on the witness. Defendant pointed out that **In re Zariyah A.**, 2017 IL App (1st) 170971, **People v. Hardimon**, 2017 IL App (3d) 120772, and **People v. Theis**, 2011 IL App (2d) 091080, all held that incriminating nonhearsay, even if admissible to show the effect on the listener, should only be admitted when necessary. The Appellate Court rejected these holdings, finding no need for a heightened standard where the evidence could be excluded if its prejudicial effect substantially outweighed the probative value. Here, the witness used the statement to explain why he shook the hand of defendant, a lower-ranking gang member. And while a limiting instruction may have been possible, the defense forfeited this option by not requesting the instruction below.

The court did note, however, that the statement could not be admitted as a tacit admission, where the record did not show defendant had an adequate opportunity to hear and respond to the accusation.

People v. Bell, 2021 IL App (1st) 190366 The trial court did not err in admitting four Twitter posts into evidence for the limited purpose of identification. The complainant testified that she used the tweets, two of which referenced her shooting and two of which showed photographs of codefendant and defendant with weapons, to identify her assailants. Her explanation of how she observed the tweets on her phone before taking a screen shot adequately laid a foundation. While defendant alleged a failure to prove the identity of the poster, neither the witness nor the State used either the written or photographic tweets to establish any admission or evidence other than explaining how the complainant arrived at her identification.

Nor was counsel ineffective for failing to move for a severance based on the tweets. Although defendant alleged the tweets apparently came from the co-defendant's account and implicated defendant in the offense in violation of **Bruton**, the tweets were not admitted as prior statements of the codefendant. They were admitted for the limited purpose of identification, and would have been admissible against defendant even if the cases were severed.

Finally, the court rejected several additional claims of ineffectiveness, finding no unreasonable performance. These included: failure to object to codefendant's opening statement which revealed defendant would testify (sound strategy where trial counsel testified at a post-trial hearing that the attorneys collaborated on the defense and had no

problem with the statement); failing to impeach the complainant with prior inconsistent statements casting doubt on her ability to observe (sound strategy where trial counsel explained he did not want to "beat up" on a sympathetic victim who made the statements in question after suffering a traumatic event); failure to object to the complainant's references to her subsequent miscarriages (sound strategy where trial counsel stated the defense theory was not that the complainant was not sympathetic, only that she was mistaken); and admitting evidence that defendant and co-defendant had been arrested with a gun similar to the one used in the crime (trial counsel explained the ballistics did not match and it therefore undermined the witness' testimony and photographic tweets, a sound strategy).

People v. Neal, 2020 IL App (4th) 170869 It was not improper for the State to use a phone bill and a piece of mail addressed to defendant at the residence where drugs were found to establish that defendant lived there and had constructive possession of the drugs. Defendant challenged the phone bill and mail as hearsay. As a matter of first impression in Illinois, the court held that defendant's name and address on the phone bill and unopened mail constitute implied assertions of fact and are not hearsay.

People v. Tetter, 2019 IL App (3d) 150243-B The trial court did not abuse its discretion when it admitted a voicemail recording over a defense objection citing a lack of foundation. A party establishes sufficient foundation when "a witness to the conversation recorded on the tape testifies that the tape, as it exists in court, accurately portrays the conversation in question." Here, the State elicited testimony from the complainant establishing that she had left the recording on the defendant's voicemail. Defendant's assertion that the State failed to prove the police actually retrieved the voicemail from the phone and that it was left on the date the complainant claims, were subjects for the defense to explore at trial, going to weight, not admissibility.

People v. Whitfield, 2018 IL App (4th) 150948 Admission of defendant's video recorded interrogation was not error even though the recording also included statements by the interrogating officers suggesting that defendant was not credible and opining that the State's case against him was strong. The officers' statements on the video were not offered for their truth, but rather provided context for the interrogation, so they were not hearsay. Similarly, the officers' statements were not improper opinion testimony because the video recording was not testimony. Unlike **People v. Hardiman**, 2017 IL App (3d) 120772, where the court improperly admitted portions of an interrogation consisting of prejudicial police accusations and defendant's denials, the defendant here made admissions throughout the duration of the videotaped statement, rendering the officers' accusations relevant.

People v. Wills, 2017 IL App (2d) 150240 Where a defendant asserts that the trial court improperly excluded evidence at trial, he must make an offer of proof as to what the excluded evidence would have been in order to provide a complete record for review. The offer of proof does not have to include formal, sworn testimony, but it must be specific and provide details of the evidence in question.

Here, defendant argued that the trial court improperly excluded, as hearsay, evidence of the content of an argument between defendant and the alleged victim, A.W. Defendant asserted that the evidence was not hearsay because it went directly to A.W.'s motive to lie. The Appellate Court agreed that it was error to exclude the evidence, but found that defendant's argument was constrained by the absence of an offer of proof. Without such an

offer, the Appellate Court would not speculate that the excluded testimony would have included sufficient detail to have made any difference in the outcome.

People v. Burgund, 2016 IL App (5th) 130119 Defendant was convicted of predatory criminal sexual assault of his two children. The State's case consisted of his confession and the testimony of his estranged wife and mother-in-law. The trial court excluded several key pieces of evidence defendant wanted to introduce to show that his confession was false and the testimony of his wife and mother-in-law was not believable.

The Appellate Court held that a defense psychologist should have been allowed to testify about his opinion that defendant had a personality that was subject to easy manipulation. An average juror would not readily understand why an innocent person might falsely believe he committed a crime. The expert's testimony would have thus aided the jury in evaluating the effect of the psychological environment that defendant claimed made him falsely confess. And it would have touched directly on the credibility of defendant's confession.

The court rejected the State's argument that the expert's testimony was properly excluded because he did not diagnose defendant as having any particular psychological or personality disorder. The jury was not required to find that defendant had a disorder before it could disbelieve his confession.

The trial court also excluded as hearsay the testimony of two witnesses who would have corroborated defendant's testimony that his wife claimed to have a supernatural power of discernment and was obsessed with making false accusations of lustful behavior. The court also excluded as hearsay the testimony of a witness who dated defendant's wife before she married defendant and would have described numerous instances where the wife accused the witness of being immoral and lustful.

Illinois Rule of Evidence 801 defines hearsay as an out of court statement offered to prove the truth of the mater asserted. Ill. R. Evid. 801(c). An out of court statement is not hearsay if it is offered merely to show that the statement was made, not that it was true.

The Appellate Court held that the testimony was not offered to prove the truth of the matters asserted in the out of court statements made by defendant's wife. Defendant was not trying to prove that his wife actually had a supernatural power of discernment or that one of the witnesses actually had a problem with immoral and lustful behavior. Defendant instead offered the testimony only to prove that his wife had made the statements. Since the statements supported his defense that his wife treated defendant in a similar manner, the trial court erred in precluding this testimony.

Finally, the trial court excluded the testimony of the ex-husband of defendant's mother-in-law. He would have testified that defendant's wife falsely told people that the ex-husband had sexually abused the mother-in-law. Defendant wanted to introduce this evidence to show that his wife would fabricate sexual abuse allegations to gain sympathy and acceptance within their church community.

Illinois law generally prohibits the impeachment of a witness with specific past instances of untruthfulness. But such evidence may be used to impeach a witness if the past act shows bias, interest, or motive to testify falsely.

The Appellate Court held that this evidence was admissible to show the wife's potential motive, interest, and bias in testifying against defendant. The trial evidence showed that defendant's marriage was tumultuous, with accusations that defendant had lust issues, physical violence stemming from those accusations, and discussions of divorce. Evidence that the wife had made false accusations in the past to gain acceptance in her church as it related to divorce was relevant to show that she may have believed that she would personally benefit again from making false accusations against defendant.

The court granted defendant a new trial.

People v. Coleman, 2014 IL App (5th) 110274 The trial court properly admitted the testimony of five witnesses about hearsay statements made by the decedent, defendant's wife, that defendant wanted a divorce. This evidence was properly admissible (a) under the statutory hearsay exception for the intentional murder of a witness; (b) under the doctrine of forfeiture by wrong doing; and (c) to establish defendant's motive.

(a) Under 725 ILCS 5/115-10.6(a), a hearsay statement is admissible if it is offered against a defendant who killed the declarant to prevent her from being a witness in a criminal or civil proceeding. The statute requires a pretrial hearing to determine the admissibility of the statements.

Here the trial court properly found at the pretrial hearing that defendant murdered his wife to prevent her from being a witness at a potential dissolution proceeding. Moreover, the statutory provision applies even though defendant had not initiated divorce proceedings.

(b) The common law doctrine of forfeiture by wrongdoing provides a hearsay exception for out-of-court statements made by an unavailable witness if the defendant intentionally prevented the witness from testifying. Here defendant intentionally prevented his wife from testifying by killing her, and thus her out-of-court statements were admissible.

(c) The deceased wife's out-of-court statements were also admissible to show defendant's motive. Her statements indicated that defendant wanted a divorce but might lose his job if he tried to obtain one. The statements thus provided a motive for killing her.

The trial court did not abuse its discretion in allowing an expert in document examination to compare writings spray-painted on the wall of the murder scene with defendant's known writings in documents. Although there is some difficulty in comparing writing in documents with spray-painted writing on a wall, the expert merely pointed out similarities between the writings and never identified defendant as the actual author of the wall writing. The jury, which saw photographs of the wall writing was thus free to accept or reject the expert's testimony. Defense counsel thoroughly cross-examined the expert, and presented his own expert who cast doubt on the ability to make such comparisons.

The admission of testimony about defendant's internet provider (IP) addresses did not violate his right to confrontation. The IP addresses were used to show that defendant sent the email threats that allegedly came from a third party who had a motive to harm the decedent. The IP addresses were obtained from Google's records and were kept in the ordinary course of business. Business records are created for the administration of a company's affairs, not for the purpose of providing evidence at trial. As such, they were not testimonial in nature and thus did not violate the confrontation clause.

The trial court properly admitted the testimony of an officer who reviewed Master Card statements and determined that spray paint was purchased using a credit card traced to defendant. Illinois Rule of Evidence 803(24) provides an exception to the hearsay rule and allows a receipt or paid bill to serve as *prima facie* evidence of the fact of a payment.

People v. Richter, 2012 IL App (4th) 101025 A statement made by an unavailable witness, identified in §201 of the Illinois Domestic Violence Act as a person protected by that Act, may be admitted as a statutory exception to the rule against hearsay in "domestic violence prosecutions," where the statement is not specifically covered by any other hearsay exception but has equivalent circumstantial guarantees of trustworthiness, if the court determines: (1) the statement is offered as evidence of a material fact; (2) the statement is more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts; and (3) the general purposes of the statutory exception and the interests

of justice will best be served by the admission of the statement into evidence. 725 ILCS 5/115-10.2a.

Section 201 of the Domestic Violence Act defines protected persons as "any person abused by a family or household member," and also defines "family or household members" and "abuse." While no statutory definition exists for the term "domestic violence prosecution," the Appellate Court found that it encompasses any prosecution in which a family or household member inflicts abuse upon a person protected by §201.

To determine whether a statement has equivalent circumstantial guarantees of trustworthiness, a trial court should examine those factors relevant to an analysis of whether hearsay possesses "particularized guarantees of trustworthiness," as articulated in **People v. Smith**, 333 Ill. App. 3d 622, 776 N.E.2d 281 (1st Dist. 2000). Even though those factors are no longer relevant to the resolution of constitutional issues under the Confrontation Clause, they remain valid analytical tools to resolve statutory issues.

The trial court acted well within its discretion in allowing statements made by the mother of defendant's children to her friends, family members and co-workers to be admitted in defendant's prosecution for her murder based on its consideration of the **Smith** factors. The Appellate Court rejected the defense argument that the statements were unreliable because the declarant had a motive to portray defendant as an unfit parent in anticipation of a custody fight over their children. None of her statements pertained to defendant's fitness as a parent, and they would have been excluded as prior consistent statements at a custody hearing.

Only testimonial hearsay implicates the Confrontation Clause. The Appellate Court held that a statement does not constitute testimonial hearsay unless there is government involvement in eliciting or receiving the statement. The court recognized that a defendant cannot be denied his right to confrontation where the declarant uses a third party as a mere conduit to incriminate defendant. "Government involvement" therefore includes the situation where the declarant intends to make a testimonial communication to authorities, and a third party merely acts as a conduit for transmission of the statement from the declarant. Whether the necessary government involvement exists is a question of fact for the trial court.

While the United States Supreme Court has not held that government involvement is necessary for a statement to qualify as testimonial, the Appellate Court found that this conclusion was consistent with United States Supreme Court decisions, and supported by legal scholars and case law from other jurisdictions that had addressed the issue. The Appellate Court acknowledged that a plurality of the Illinois Supreme Court rejected the argument that only statements to law enforcement personnel can be testimonial in **People v. Stechly**, 225 Ill. 2d 246, 870 N.E.2d 333 (2007). That statement by the plurality is dicta because it was unnecessary to the resolution of the issue before the court, and a majority of the court did not support that position.

Because none of the statements admitted at defendant's trial were made to government officials, no Confrontation Clause violation occurred. The declarant volunteered the statements to friends, family members and co-workers "for a host of reasons that had nothing to do with ensuring defendant was incarcerated but, instead, had everything to do with her concern that the defendant might kill her."

People v. Connolly, 406 Ill.App.3d 1022, 942 N.E.2d 71 (3d Dist. 2011) Statements are admissible under the excited-utterance exception to the hearsay rule where there is an occurrence sufficiently startling to produce a spontaneous and unreflecting statement, an absence of time for the declarant to fabricate the statement, and a statement relating to the circumstances of the occurrence. The critical inquiry with respect to time is whether the

statement was made while the declarant was still affected by the excitement of the event. That the statement was made in response to inquiry does not necessarily destroy spontaneity.

An act of domestic violence is sufficiently startling to render inoperative the normal reflective thought processes of a victim. Statements made within a few minutes of an act of domestic violence also do not allow time for reflection while the emotional upset resulting from the event continues. Therefore the trial court did not abuse its discretion in concluding that the totality of circumstances supported the conclusion that defendant's wife's statements were excited utterances, even though made in response to police questioning.

An out-of-court statement made to a law enforcement official is not testimonial when the circumstances objectively indicate that the primary purpose of any questioning was to address an ongoing emergency. Factors to be considering in deciding whether the interrogation was to meet an ongoing emergency are: (1) whether the purpose was to determine a past fact or ascertain an ongoing event; (2) whether the situation could be described as an emergency; (3) whether the nature of the questions focused on the present or on the past; and (4) the level of formality involved.

The statements by defendant's wife were not testimonial because the statements were made while the police addressed an ongoing emergency. Defendant's neighbor called the police when she observed defendant and his wife screaming and yelling at each other as defendant held their son. The police arrived on the scene five to seven minutes after the dispatch and spoke with defendant's wife who appeared nervous, upset, and agitated. Defendant's wife reported that defendant had battered her, had set their son in the street, and then had left with the son. The police questioned other witnesses to assess the ongoing situation, and then proceeded to locate defendant and the child, who was returned to the wife.

People v. McNeal, 405 Ill. App. 3d 647, 955 N.E.2d 32 (1st Dist. 2010) The testimony of a nurse regarding the statements of the complainant contained in the triage notes of another nurse was not hearsay. The testimony was not offered for the truth of the matter asserted, but to explain the actions of the nurse in treating the complainant.

Even if the testimony of the nurse regarding the triage notes was hearsay, it was properly admitted as an exception to the hearsay rule pursuant to 725 ILCS 5/115-13, which authorizes admission of statements of sexual assault victims made to medical personnel for purposes of medical diagnosis and treatment.

People v. Munoz, 398 Ill.App.3d 455, 923 N.E.2d 898 (1st Dist. 2010) Under the "state of mind" exception to the hearsay rule, a hearsay statement may be admissible if it expresses the declarant's state of mind at the time of the utterance, the declarant is unavailable to testify, there is a reasonable probability that the hearsay statements are truthful, and the statements are relevant to a material issue in the case.

People v. Moore, 294 Ill.App.3d 410, 689 N.E.2d 1181 (2d Dist. 1998) Noting a "surprising dearth" of authority concerning whether testimony about the actions of a narcotics dog is hearsay, the court concluded that the "reaction of the police dog, although subject to different interpretations, [is] sufficiently probative of the presence of narcotics to be admissible." Thus, the trial court did not err by admitting testimony that a police dog alerted during a sniff of the defendant's automobile.

People v. Reed, 108 Ill.App.3d 984, 439 N.E.2d 1277 (2d Dist. 1982) The contents of an address book found in a vehicle was not hearsay. The book was not introduced to prove the

matter asserted therein (i.e., that defendant's phone number was 898-8973), but to show that the owner of the vehicle knew the defendant.

People v. DeJesus, 71 Ill.App.3d 235, 389 N.E.2d 260 (2d Dist. 1979) An interpreter's translation of testimony does not constitute hearsay. The interpreter is merely a conduit for testimony and makes no statement of his or her own.

People v. Williams, 62 Ill.App.3d 966, 379 N.E.2d 1268 (1st Dist. 1978) Policeman's testimony about a description of the defendant obtained from a radio broadcast was not hearsay where it was not offered to prove the truth of the broadcast, but only to prove that the broadcast was made and that the officer had probable cause to make an arrest.

People v. Garlick, 46 Ill.App.3d 216, 360 N.E.2d 1121 (5th Dist. 1977) Trial court erred in prohibiting defendant's mother and sister from testifying about various statements made by defendant during the month before the alleged murder. Such testimony was not hearsay, because it was offered not to show the truth of the matter asserted, but on the issue of defendant's mental state and insanity defense.

People v. O'Neal, 44 Ill.App.3d 133, 358 N.E.2d 47 (1st Dist. 1976) Witness's testimony (that a third party "pulled a gun and said stay in the store") was not hearsay, since it was not offered to prove the truth of the matter asserted.

§19-10(d)
Examples: Inadmissible Testimony

United States Supreme Court
Bullcoming v. New Mexico, 564 U.S. 647, 131 S. Ct. 2705, 2707, 180 L. Ed. 2d 610 (2011)
The Sixth Amendment Confrontation Clause permits introduction of testimonial statements of witnesses absent from trial only where the declarant is unavailable and the defendant has had a prior opportunity to cross-examine. **Crawford v. Washington**, 541 U.S. 36 (2004). There is no forensic-evidence exception to this rule. An analyst's certification prepared in connection with a criminal investigation or prosecution is testimonial and therefore within the compass of the Confrontation Clause. **Melendez-Diaz v. Massachusetts**, 557 U.S. ___, 129 S.Ct. 2527, ___ L.Ed.2d ___ (2009).

To admit a forensic laboratory report certifying that defendant's blood-alcohol level was above the threshold required for aggravated DWI, the State called an analyst from the laboratory who qualified as an expert witness with respect to the gas chromatograph machine used to perform the analysis as well as the laboratory's procedures. The witness had not signed the certificate and had neither participated in nor observed the test on defendant's blood sample. The certifying analyst had been placed on an unpaid leave for an undisclosed reason, and was not called to testify. The court held that this surrogate testimony did not satisfy the Confrontation Clause.

The testimony of the surrogate analyst was not a substitute for the testimony of the certifying analyst. The surrogate could not convey what the certifying analyst knew or observed about the test or the testing process. His testimony could not expose any lapses or lies on the certifying analyst's part, or address the circumstances that led to the certifying analyst's unpaid leave. The surrogate analyst had no independent opinion regarding defendant's blood-alcohol level. The Confrontation Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial

statements provides a fair enough opportunity for cross-examination. In short, when the State elected to introduce the analyst's certification, the certifying analyst became the witness defendant had the right to confront.

The certified blood-alcohol reports were testimonial. A document created solely for an evidentiary purpose, made in aid of a police investigation ranks as testimonial. That the reports were not sworn to as in **Melendez-Diaz** was not dispositive.

Illinois Appellate Court

People v. Quezada, 2022 IL App (2d) 200195 Multiple evidentiary errors at defendant's trial served to deny him a fair trial. While none of these errors, individually, was reversible, their cumulative effect was such that a new trial was required.

Specifically, it was error to admit the video interrogations of a witness. The witness testified for the State at trial and, while there were minor inconsistencies between his testimony and his prior statements to the police, the witness did not affirmatively damage the State's case, so the videos were not admissible for impeachment purposes. Similarly, the videos could not be admitted substantively under 725 ILCS 5/115-10.1 because they were not inconsistent with the witness's testimony. By showing the jury the entire interrogation, the State was able to improperly bolster the witness's testimony with prior consistent statements. This error was not preserved in the trial court, and it did not rise to the level of plain error under either the first or second prong.

It also was error to admit gang evidence at defendant's trial. The State's gang expert's testimony lacked adequate foundation; the expert did not testify that the factors he considered when assessing defendant's status as a gang member were of the sort reasonably relied upon by experts in the field. The fact that the witness had testified as a gang expert in prior cases did not necessarily mean that he relied on appropriate factors in this case. The Appellate Court agreed that the gang evidence was weak, and defense counsel should have moved to sever the charge of unlawful possession of a firearm by a street gang member from the charges of attempt murder of a police officer, aggravated discharge of a firearm, and possession of a defaced firearm. There was no evidence that those charges had a gang-related motive, and the gang evidence should not have been admitted with regard to those charges. (The court also reversed outright the unlawful possession of a firearm by a street gang member conviction on the basis that the State had failed to prove the gang member element beyond a reasonable doubt.)

Based on the cumulative effect of these two errors, the Appellate Court reversed defendant's convictions and remanded for a new trial.

People v. Jefferson, 2021 IL App (2d) 190179 Counsel was not ineffective for failing to object when the State elicited prior statements of eyewitnesses through cross-examination of a responding officer. Specifically, defendant argued that counsel should have objected when the officer was asked to describe the eyewitnesses' statements that the offenders carried firearms during the home invasion. Defendant argued these statements were hearsay and outside the scope of direct examination.

The objection would not have been successful, because counsel opened the door to the testimony on direct examination. In an effort to impeach the eyewitnesses, counsel had asked the officer about certain inconsistencies in the eyewitnesses' descriptions of the perpetrators of the home invasion, thereby allowing the State to elicit other statements bearing on the eyewitness' credibility. A party on cross-examination may "develop all circumstances within the knowledge of the witness that explain, qualify, discredit or destroy his direct testimony,

even if such examination constitutes new matter that aids the cross-examiner's case." **People v. Stevens**, 2014 IL 116300, ¶ 16

People v. Collins, 2020 IL App (1st) 181746 The trail court erred in admitting the audio from the arresting officer's body camera, because it contained inadmissible hearsay and prior consistent statements. Defendant had been arrested for gun possession. The State alleged officers approached him, he ran, dropped a gun, and was found hiding a short distance away. On the body cam video, the arresting officer can be heard describing defendant dropping the gun and directing fellow officers to the location of the gun. After the defense objection to the evidence was overruled, defense counsel admitted a different officer's body cam footage in defense.

The Appellate Court first rejected the State's argument that defendant "waived" the error by admitting body cam footage in its own case. The defense consistently objected to the body cam footage before, during, and after trial, and used footage in its own case only after losing its objections. A defendant does not sacrifice his preservation of an issue by using the court's ruling to his advantage.

Second, the court noted that the Law Enforcement Officer Worn Body Camera Act ("Act") allows for footage to be admitted into evidence at trial. But, statutory evidentiary rules must submit to court rules when in conflict, and the Illinois Rules of Evidence prohibit hearsay. Thus, the Act's language must be understood as allowing admission only to the extent authorized by the Rules of Evidence.

The statements here were hearsay and admitted to show the truth of the matter asserted – that defendant dropped a gun. Although an officer's out-of-court statements may be admitted to show the course of their investigation, such statements are admissible only when "necessary and important" to explain the State's case. Here, the officers had already testified to their version of how the gun was dropped and why they returned to the lot to recover it. See **People v. Jura**, 352 Ill. App. 3d 1080 (2004). Finally, the error was not harmless where the case hinged on officer credibility, the entire video was played during closing arguments, and the prosecutor argued that the jury should believe the officer's testimony in part because of the prior statements made on the video.

People v. Gladney, 2020 IL App (3d) 180087 Officers investigating an assault ordered three suspects to the ground and searched them. On one of the suspects, the officers found a bag of drugs. While testifying about his recovery of the bag, the officer stated that "other officers observed [defendant] passing" this bag to the suspect. A defense objection on hearsay grounds was overruled.

When the suspect with the bag took the stand, he stated that defendant passed him a cell phone, not a bag of drugs. Over defense objection, he admitted that, at the scene, he told the officer that defendant passed him that bag. He testified that this was untrue, and that he only stated so because he was scared. The State called an officer who heard the suspect's statement at the scene, and this officer testified, over objection to hearsay, that the suspect admitted defendant passed him the bag of drugs. The post-trial motion did not complain of the hearsay rulings.

The Appellate Court agreed with defendant that the first statement was hearsay, because it relayed the statements of the other officers in an attempt to prove the truth of the matter – that defendant possessed the drugs. But, the error was forfeited, and the evidence of defendant's possession was not closely balanced, as other officers witnessed the transaction and no cell phone was found on the other suspect. As for the suspect's statement at the scene, the court found no hearsay problem, as it met both the personal knowledge and

acknowledgment requirements of Rule 801(d)(1)(A)(2)(b). Moreover, the statement was admissible as impeachment.

People v. Othman, 2020 IL App (1st) 150823-B The trial court erred in admitting other crimes evidence. In a murder trial, the State's witnesses alleged that defendant shot his uncle in 2008, and that in 2010 he gave a gun to his girlfriend. A jailhouse informant testified that defendant told him about the 2008 shooting and the 2010 decision to give a gun to his girlfriend. At trial, the State argued that the informant's knowledge of the gun possession in 2010 lent credence to his testimony that defendant confessed to him. The Appellate Court found reversible error, holding that other crimes evidence can't be used to bolster the credibility of State witnesses. Moreover, the trial court erred when it instructed the jury that the other crime could be considered as evidence of intent, despite the fact that the State used it only to bolster its informant's credibility, causing confusion and prejudice to the defense.

Defendant also received ineffective assistance of counsel because his trial attorney failed to object to hearsay. A State witness testified that she knew defendant killed the decedent because she heard it from "friends in the neighborhood." Counsel's failure to object to these anonymous out-of-court accusations rendered his performance deficient. The decision was not strategic, and prejudicial.

People v. Denis, 2018 IL App (1st) 151892 The court erred in admitting complainant's outcry statement made 10 years after the alleged sexual assault. The State contended that because the outcry occurred during an argument with her mother, it was an excited utterance. But the court held that the statement must stem from excitement caused by the incident discussed in the statement. Here, the statement referred to a 10-year-old incident. Although that incident was traumatic, the excitement of those events no longer predominated when the complainant made her statement. Nor did the corroborative complaint exception apply, because that exception does not allow the witness to provide details of the complaint or the identity of the perpetrator.

Because neither of these hearsay exceptions applied, the outcry was an inadmissable prior consistent statement. The State did not elicit the statement to rebut a charge of recent fabrication; the State elicited the statement on direct examination. However, the error was not prejudicial where defendant confessed and the complainant credibly testified about the offense at trial.

People v. Ramos, 2018 IL App (1st) 151888 Historical cell site analysis report, showing which towers cell phone pinged and at what times, was hearsay. While such cell phone records are frequently admissible as business records, the State did not call a witness to lay a proper foundation and the report was not certified as self-authenticating in accordance with Illinois Rule of Evidence 902(11). A detective's testimony as to the locations where the co-defendant's phone traveled during the relevant period was improperly admitted because it was based on the historical cell site analysis report.

People v. Harper, 2017 IL App (4th) 150045 Rule 803(6) is an exception to the hearsay rule that permits the admission of records that were kept in the regular course of business. Ill. R. Evid. 803(6). Business records sometimes contain multiple layers of hearsay if they include information supplied by a declarant who is not himself under a duty to provide such information for the business. Multiple layers of hearsay are admissible only where both the source and the recorder of the information are acting in the regular course of business.

Defendant was charged with first degree murder. Shortly after the offense occurred several text messages were sent to defendant's phone number from an unidentified person. The first message said "I heard you had something to do with a white boy getting killed today." Defendant responded, "What white boy?" Another message followed a few minutes later. It said, "Out in the hood." Defendant replied, "What are you talking about?" The unidentified person then responded with a third and final message: "I heard a white boy got killed in the hood and you and some of your guys did it. That's the word on the street."

The Appellate Court held that none of the incoming text messages were admissible under the business records exception to the hearsay rule. Neither defendant nor the person or individuals sending him text messages were acting in the regular course of business. A record from the phone company showing the time and recipient or maker of texts to or from a number registered to a defendant would be admissible as a business record. But the content of these messages would not be admissible. The State never identified who sent the messages nor the source of the information in the texts. And even if the texters had been identified and called as witnesses at trial, they could not testify that they "heard on the street" that defendant was involved in the offense.

Since the admission of these text messages was "extremely prejudicial," the court reversed defendant's conviction and remanded for a new trial.

People v. Weinke, 2016 IL App (1st) 141196 The prosecutor asked the court for permission to conduct a video deposition of the victim to preserve her testimony, asserting that she had suffered critical injuries and it was unclear how long she would survive. The prosecutor stated that based on her review of the medical records and conversations with the victim's physicians, she might not survive her upcoming surgery. The court granted the motion and . allowed the deposition into evidence and following a bench trial convicted defendant of first degree murder. The Appellate Court held that the deposition was improperly admitted.

First, the court held that as a matter of law the State failed to meet its burden under Rule 414 of providing the court with evidence that the deposition was necessary because there was a substantial possibility that the witness would be unavailable at trial. Ill. S. Ct. R. 414. The State's written motion was "perfunctory, cursory, and without any supporting documentation."

Instead, the State relied on its oral assertions about the victim's injuries and medical condition. But none of these assertions constituted evidence. They were simply assertions. The court thus found that even if the assertions had been accurate, they did not satisfy the rule's requirement that at least some evidence is needed to satisfy the movant's burden. Additionally, the court found that many of the State's assertions were "false, misleading, or both." The State seriously exaggerated the victim's injuries and her medical condition, as well as the source of its information.

Allowing the deposition to be taken before defendant had an opportunity to investigate the case and develop evidence gave the defense virtually no ability to fulfill its necessary adversarial function. Under these circumstances, granting the deposition was reversible error.

The court also found that the admission of the deposition violated defendant's right to confront witnesses under the federal and Illinois constitutions. Preexisting testimony is admissible if the witness is unavailable at trial and defendant had an adequate opportunity to effectively cross-examine the witness. To determine whether a defendant had an adequate opportunity for cross-examination, courts examine the motive and focus of the prior cross-examination, whether the cross was unlimited, and what counsel knew when conducting the examination.

The court found that here the motive was the same and that there was no limit placed on counsel's cross. But the focus of the cross would have been different at trial because counsel was not prepared to question whether the evidence supported defendant's guilt because he had no opportunity to prepare for the hastily convened deposition. Additionally, counsel was at a "severe informational disadvantage" due to his inability to prepare. Thus, since counsel did not have an adequate opportunity to cross-examine the witness, the use of the deposition at trial violated defendant's right to confrontation.

People v. McCullough, 2015 IL App (2d) 121364 Under Illinois Rule of Evidence 803(16) (the ancient document rule) statements in an authenticated document that has been in existence 20 years or more may be admitted as an exception to the hearsay rule. If the author of the ancient document had personal knowledge of the substance underlying the assertions in the document, the document is admissible. Although there are no Illinois cases on point, federal courts interpreting an identical federal rule of evidence are split on whether the ancient document rule allows admission of all assertions in the document, even those that involve double hearsay. Some courts require a separate hearsay exception for each layer of hearsay contained in a document, while others allow the admission of all statements in a document.

Defendant was tried in 2012 for a kidnapping and homicide that occurred in the town of Sycamore in 1957. Defendant sought admission of FBI reports that were prepared during the 1957 investigation of the case and contained evidence of an alibi that had otherwise disappeared due to the death of the witnesses. The reports contained multiple layers of hearsay (FBI agents who had no personal knowledge of the events reporting what various witnesses had told them), and they relied to a large extent on statements of defendant or his family members. The reports established that defendant had not been in Sycamore at the time of the offense.

The Appellate Court held that the reports were not admissible. The court adopted the view that each layer of hearsay requires its own hearsay exception before it is admissible. Since all the statements in the reports contained multiple layers of hearsay, the ancient document rule did not allow their admission. The court also noted that one of the bases for the ancient document rule is that statements in an ancient document are usually written before a motive to fabricate arises. But here much of the alibi was based on the statements of defendant or his family, who had a motive to fabricate at the time the FBI reports were created.

Under Illinois Rule of Evidence 804(b)(3), an out-of-court statement that would subject a person to civil or criminal liability is admissible. Three conditions must be met before the statement can be admitted: (1) the declarant must be unavailable; (2) the statement must be against the declarant's penal interest; and (3) the trustworthiness of the statement must be corroborated.

The trial court admitted the 1994 deathbed statement of defendant's mother that defendant "did it." The trial court agreed with the State's theory that the statement was against her penal interest since it showed that she had lied in 1957 when she told the FBI that defendant was at home at the time of the offense, and hence was subject to possible prosecution for obstruction of justice.

The Appellate Court held that the trial court erred in admitting the statement since it was not against the mother's penal interest. The court held that the statement itself must on its face be self-incriminating. The mother's statement, however, did not on its face incriminate her. Instead, to be incriminating, the State would have needed to introduce the inadmissible hearsay statement of what the mother told the FBI in 1957 and then speculate

that (1) the State could have prosecuted her for obstruction of justice 37 years later as she lay dying of cancer, and (2) that she would have waived any statute of limitations bar.

Although the Appellate Court held that the statement should not have been admitted, it affirmed defendant's conviction on harmless error grounds.

People v. Bailey, 409 Ill.App.3d 574, 948 N.E.2d 690 (1st Dist. 2011) Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted. Out-of-court statements offered for a purpose other than to prove the truth of the matter asserted, such as to show the effect on the listener's state of mind, or to show why the listener acted the way that he or she did, are not hearsay.

The court rejected the defendant's argument that the out-of-court statements she sought to admit were not hearsay because they were offered to explain defendant's conduct. As there was no evidence that defendant actually heard these statements, the evidence could not be used to show its effect on defendant, and it was inadmissible hearsay.

Out-of-court statements that have independent legal significance as "words of contract" are not hearsay. **Kukla Press, Inc. v. Family Media, Inc.**, 133 Ill.App.3d 939, 479 N.E.2d 1116 (1st Dist. 1985). The out-of-court statements that defendant sought to admit were not admissible as non-hearsay words of contract because they did not purport to authorize defendant to do anything.

People v. Fillyaw and Parker, 409 Ill.App.3d 302, 948 N.E.2d 1116 (2d Dist. 2011) Statements made to a testifying witness by a third party describing events of which the witness has no firsthand knowledge are inadmissible as substantive evidence pursuant to the prior-inconsistent-statement exception to the hearsay rule provided by 725 ILCS 5/115-10.1(c)(2). Therefore, a statement made by Fillyaw to a prosecution witness admitting that he had kicked in a door and shot three people was inadmissible under the personal-knowledge limitation of §115-10.1(c)(2).

Admission of a nontestifying co-defendant's admission inculpating the defendant in the offense violates not only a defendant's federal constitutional right to confrontation, but also Illinois hearsay rules. Therefore, Fillyaw's statement implicating Parker in the commission of the offense was inadmissible against Parker. Although the jury was instructed to give separate consideration to each defendant, that any evidence limited to one defendant should not be considered as to the other, and that a statement made by one defendant may not be considered as to the other, it was given no contemporaneous instruction to disregard the statement when considering Parker's guilt. These instructions were insufficient to remedy the state law error; only complete redaction of all references to Parker would suffice.

Because the error implicated defendant's due process and confrontation clause rights, it necessarily affects substantial rights and satisfies the second prong of the plain-error analysis.

People v. Virgin, 302 Ill.App.3d 438, 707 N.E.2d 97 (1st Dist. 1998) The trial judge erred by admitting several items of hearsay.

1. The judge erred by admitting the contents of the search warrant. Such evidence may be admitted for the limited purpose of explaining the officers' conduct, but not to prove that the defendant fit the warrant's description of the offender and therefore must have been the person who possessed cocaine.

2. The trial court erred by admitting evidence that an occupant of the searched premises told police that her home was elsewhere in Chicago, to prove the prosecution's

theory that defendant was the tenant of the bedroom where drugs were found. The court rejected the State's argument that the testimony was admissible as impeachment.

Where a witness is impeached with her own out-of-court statements, her credibility is undermined by the mere fact that she made conflicting statements, but the out-of-court statements are not considered for the truth of the matters asserted. Where the alleged "impeachment" is a contradictory, out-of-court statement made by a person other than the witness, its evidentiary value lies not in the fact of self-contradiction, but in the truthfulness of the contradictory statement. Such a statement is classic hearsay because it is probative only if considered for the truth of its assertions.

Here, the officer's testimony about the statement had evidentiary value only because it contradicted defense testimony that the declarant lived in the bedroom where the cocaine was found. Because the statement clearly was offered to prove the truth of the matters asserted, it was improperly admitted.

People v. Smith, 256 Ill.App.3d 610, 628 N.E.2d 1176 (3d Dist. 1994) 1. At defendant's trial for armed robbery, the trial court erred by admitting a fingerprint examiner's testimony that her identification of a latent fingerprint as having been made by the defendant had been "verified by another fingerprint examiner." Such testimony was clearly offered to prove the truth of the matter asserted - that the fingerprint had been left by the defendant - and therefore was inadmissible hearsay.

2. The error was not harmless on the theory that the second examiner's opinion was cumulative and the evidence of guilt overwhelming. One State's witness made a pre-trial identification of a man other than the defendant, and there were significant discrepancies between the descriptions given shortly after the offense and defendant's physical appearance at trial. In addition, the jury's questions showed a special interest in both fingerprint evidence and the second expert's opinion. Furthermore, in the State's closing argument the prosecutor not only used the hearsay to boost the credibility of the testifying expert, but also blamed the defendant for not calling the second expert, whose existence had never been disclosed to the defense.

People v. Tucker, 186 Ill.App.3d 683, 542 N.E.2d 804 (1st Dist 1989) A police officer testified that after stopping the defendant, he checked with a police dispatcher, was told that the car in defendant's possession was stolen and obtained the name and phone number of the person who had reported it stolen.

The Appellate Court held that the portion of the officer's testimony concerning the dispatcher's response (i.e., "the name and phone number of the person who had reported the car stolen") was improper hearsay.

People v. Harbold, 124 Ill.App.3d 363, 464 N.E.2d 734 (1st Dist. 1984) At defendant's trial for murder, a State witness was allowed to testify about a conversation she had with the victim's wife, in the presence of defendant. According to the alleged statement by the wife, she and the defendant had spent time together in a cottage in Wisconsin. The wife did not testify.

The Appellate Court held that the testimony was hearsay and was prejudicial because it tended to show that defendant had a motive to kill the decedent. The Court also held that the wife's alleged statements were not admissions by defendant - defendant was present when the statements were made, but did not adopt them.

People v. Davis, 130 Ill.App.3d 41, 473 N.E.2d 387 (1st Dist. 1984) At a trial for armed robbery, the victim testified that a few months after the crime defendant's mother apologized and asked her to drop the charges against the defendant. The mother was subsequently called as a defense witness, and denied that she had asked the victim to drop the charges. On cross-examination, the State was allowed to bring out the conversation between the victim and defendant's mother.

Although the defendant did not object to the victim's testimony, the Appellate Court found that plain error occurred. The only conceivable purpose for eliciting the apology testimony was to raise the highly prejudicial inference that the defendant's own mother believed him to be guilty of the crimes charged. Under these circumstances, the admission of the hearsay was error.

People v. Escobar, 77 Ill.App.3d 169, 395 N.E.2d 1028 (1st Dist. 1979) The testimony by a State witness (that everybody knew the defendant as "New York" and somebody at the crime scene pointed to the perpetrator's car and said "that's New York") was inadmissible hearsay.

Also, a State witness's testimony that he gave a shell to the police because he had been told it was found in defendant's car was inadmissible hearsay for the purpose of showing that the shell came from that car, as was argued by the prosecutor in closing argument. Such testimony was inadmissible even if, as argued by the State, its purpose was to merely explain why the witness brought the shell to the police. "[T]he danger that the jury would misuse the evidence is so much greater than the value of detailing why [the witness] thought the shells were important."

People v. McClinton, 59 Ill.App.3d 168, 375 N.E.2d 1342 (1st Dist. 1978) Police officer's testimony that a certain handgun was registered to the defendant was inadmissible hearsay. The testimony did not come within the public records exception to the hearsay rule, as there was no showing that the officer personally examined the public record and that it was physically impossible to produce the registration document in court.

People v. Spivey, 58 Ill.App.3d 677, 374 N.E.2d 1068 (1st Dist. 1978) Trial court erred by allowing a police officer to testify about a third party's conversation, on the ground that the defendant was present during the conversation. The mere presence of the defendant when an out of court statement was made does not constitute an exception to the hearsay rule.

People v. Parrott, 40 Ill.App.3d 328, 352 N.E.2d 299 (1st Dist. 1976) During defendant's trial for unlawful use of weapons, two police officers were permitted to testify about a police department memorandum and a photo of defendant. The memo stated that firearms were being sold to street gangs, and the officers testified that defendant was to be contacted to see if he was "indeed involved" in such sales.

The court held that such testimony was a classic example of incompetent hearsay, because the contents of the memorandum were offered for the purpose of establishing the truth of the statements therein and the person who prepared the memorandum was not subject to cross-examination.

People v. Trotter, 27 Ill.App.3d 136, 326 N.E.2d 524 (1st Dist. 1975) Policeman's testimony concerning the alleged statement of defendant's neighbor (that defendant was not at his apartment on the date he had claimed) was inadmissible hearsay.

Peple v. Richardson, 48 Ill.App.3d 307, 362 N.E.2d 1104 (2d Dist. 1977) Police reports are not admissible in evidence, and the prosecutor's attempt to introduce a police report before the jury, notwithstanding the cautionary comment of the court, was error.

§19-10(e)
The "Completeness" Doctrine

Illinois Supreme Court

People v. Manning, 182 Ill.2d 193, 695 N.E.2d 423 (1998) Under the "curative admissibility" doctrine, once the defense has "opened the door" to a subject on cross-examination, the State may clarify matters brought out on cross-examination and rebut unfavorable inferences left by the cross-examination. The "curative admissibility" doctrine is not a "panacea," however; its application is limited "to those situations where its invocation is deemed necessary to eradicate undue prejudicial inferences which might otherwise ensue from the introduction of the original evidence." Where no "undue prejudicial inferences" exist, the doctrine does not apply.

Thus, where the State was not "unduly prejudiced" by the cross-examination of the decedent's wife, the "curative admissibility" doctrine was inapplicable.

The "completeness" doctrine, which allows an opponent to bring out an entire conversation where one party has elicited only a portion, applies only where there is prejudice to the party seeking to bring out the remainder of the conversation.

People v. Patterson, 154 Ill.2d 414, 610 N.E.2d 16 (1992) The completeness doctrine allows the admission of portions of a statement which are necessary to place other, properly admitted portions of the statement in context. Where defendant was not attempting to introduce additional portions of statements introduced by the State, but completely separate statements, the doctrine did not apply. See also, **People v. Ward**, 154 Ill.2d 272, 609 N.E.2d 252 (1992) (the "completeness doctrine" applies only where admission of additional portions of a statement is required in order to place properly admitted portions of the document in proper context); Lawson v. G.D. Searle, 64 Ill.2d 543, 356 N.E.2d 779 (1976) (when one party introduces part of an utterance or writing, the opposing party may introduce the remainder or so much thereof as is required to place that part originally offered in proper context so that a correct and true meaning is conveyed to the jury**); People v. Andersch**, 107 Ill.App.3d 810, 438 N.E.2d 482 (1st Dist. 1982) (the party offering the remaining portion of a statement is required to show that it is relevant to place the admitted portion in context).

People v. Olinger, 112 Ill.2d 324, 493 N.E.2d 579 (1986) When part of a statement is brought out by the State, the defendant is entitled to introduce additional portions of the statement when "necessary to prevent the jury from being misled by the portion of the statement introduced by the State" or "to prevent the jury from receiving a misleading impression as to the nature of the statement." However, the defendant "has no right to introduce portions of a statement which are not necessary to enable the jury to properly evaluate the portions introduced by the State."

In this case, the trial judge properly excluded the remainder of a statement proffered by the defendant because the defendant did not urge that the portions introduced by the State were misleading and did not explain the reasons why the remainder should be admitted. "The trial court need not sua sponte scrutinize the proffered statements to determine if there may be a rationale to admit some small portion thereof."

People v. Weaver, 92 Ill.2d 545, 442 N.E.2d 255 (1982) When the State brought out part of a conversation between the defendant and the witness, it was improper to prohibit the defendant from bringing out the remainder of the same conversation. "[W]here a conversation is related by a witness the opposing party has a right to bring out all of the conversation on cross-examination." Thus, in "view of the possibility that the jurors would be misled into thinking that the defendant has said nothing else, we believe the trial court should have allowed [the witness] to testify to the defendant's statement."

Illinois Appellate Court

People v. Perkins, 2024 IL App (2d) 230214 The trial court abused its discretion when it suppressed a jailhouse recording of defendant's confession. Defendant had argued that the recording, which was originally comprised of 19 hours over multiple days, had too many inaudible portions to be deemed trustworthy. Even after the State cut down the recording to four mostly audible hours, the trial court maintained that the presence of several gaps in the audio warranted suppression.

The State appealed and the appellate court reversed, holding that none of the inadudible portions of the recording "undercuts the recordings' reliability or trustworthiness." The appellate court relied on **People v. Manning**, 182 Ill. 2d 193, 212 (1998), where the supreme court held that a "partially inaudible sound recording is admissible unless the inaudible portions are so substantial as to render the recording untrustworthy as a whole." There, the supreme court found a recording admissible even though it contained gaps during defendant's confession. The court reasoned that these gaps were explained by the informant's testimony that the microphone was muffled or equipment failure, and these explanations rebutted any claim that the gaps undermined the trustworthiness of the audible portions.

In this case, the trial court and defense improperly focused on the quantity of the gaps in the recording instead of the reason for the gaps. As in **Manning**, there is nothing to indicate that the inaudible portions of the recordings diminish the trustworthiness of the audible portions. To the extent defendant's statements include inaudible portions, any inaudibility goes only to the weight given to the statements, not their admissibility.

People v. Hernandez-Chirinos, 2024 IL App (2d) 230125 Defendant was convicted of predatory criminal sexual assault and abuse of his 12 year-old stepdaughter. The complainant made an outcry against defendant to her mother, who brought her to a hospital, where it was discovered she was pregnant. In her initial interview with a child advocate, the complainant made several allegations of abuse against defendant. But DNA testing soon revealed the father of complainant's child was her stepbrother, not her stepfather. In a second interview, the complainant alleged her stepbrother sexually abused her as well, and that she did not reveal that abuse in the first interview because she feared her stepbrother and did not want to upset her mother.

The parties agreed that the rape shield statute did not prevent the admission of evidence of the stepbrother's abuse, nor would it prevent the defense from cross-examining the complainant about her omission of this allegation from her initial interview. But the trial court denied the defendant's argument that the completeness doctrine required the State to publish the recording of the second interview after the first interview.

At trial, the jury heard the initial interview, the complainant's testimony about the sexual abuse by both her stepfather and stepbrother, various other outcry statements to friends, and a stipulation to the stepbrother's arrest for predatory criminal sexual assault of the complainant. The defense cross-examined the complainant about her omissions,

inconsistencies, and whether she blamed defendant only because she feared her stepbrother or upsetting her mother. After hearing this evidence the jury convicted defendant of all counts.

On appeal, defendant argued that the second interview should have been played for the jury pursuant to the completeness doctrine and Illinois Supreme Court Rule 106, and that counsel was ineffective for failing to play it during the defense case-in-chief. The appellate court first highlighted the distinction between the common law completeness doctrine and Rule 106, noting that defendant's objection below never mentioned Rule 106. Under Rule 106, a party may seek introduction of any written or recorded statement that "ought in fairness" be considered, regardless of when it was made. Under the common law completeness doctrine, however, the writings or recordings must have been made at the same time. Because defendant's motion included only the common law grounds, he forfeited a Rule 106 objection. Because the statement defendant sought to admit was made a month after the initial statement, the common law completeness doctrine does not apply.

Regardless, the appellate court would not find plain error with regard to Rule 106, because counsel could have played the recording in the defense case-in-chief. The trial court's denial of defendant's motion to publish the statement pertained only to the State's case-in-chief.

Further, counsel was not ineffective for failing to introduce the statement during the defense case-in-chief because the jury had already heard ample evidence about the stepbrother's abuse and the complainant's initial failure to disclose that abuse. The jury would have fully understood the allegations against the stepbrother, and the potential implications for the complainant's credibility. In light of this, defense counsel could have strategically determined that playing the recording would have minimal probative value and only serve to make the complainant more sympathetic in the eyes of the jury.

People v. Hinthorn, 2019 IL App (4th) 160818 Defendant's wife testified against him in a trial for the predatory criminal sexual assault of their daughter. Some of the counts alleged that defendant acted as an accomplice to his wife during one of the assaults. The State's pre-trial request to admit other crimes evidence of prior sexual assaults by defendant against his wife had been denied.

Defendant's wife testified that she was forced to engage in a sex act with her daughter out of fear that defendant would beat her. Defendant's cross-examination attacked this testimony by highlighting prior inconsistent statements. The trial court allowed the State to then admit the other crimes evidence because the cross-examination opened the door. The Appellate Court agreed, holding that under the doctrine of curative admissibility the other crimes evidence was necessary to give the jury the complete picture of the wife's state of mind. The Appellate Court rejected, however, the State's assertion that the evidence was admissible under the completeness doctrine, which applies to communications, not acts.

People v. Whitfield, 2018 IL App (4th) 150948 Admission of defendant's video recorded interrogation was not error even though the recording also included statements by the interrogating officers suggesting that defendant was not credible and opining that the State's case against him was strong. The officers' statements on the video were not offered for their truth, but rather provided context for the interrogation, so they were not hearsay. Similarly, the officers' statements were not improper opinion testimony because the video recording was not testimony. Unlike **People v. Hardiman**, 2017 IL App (3d) 120772, where the court improperly admitted portions of an interrogation consisting of prejudicial police accusations

and defendant's denials, the defendant here made admissions throughout the duration of the videotaped statement, rendering the officers' accusations relevant.

People v. Craigen, 2013 IL App (2d) 111300 Illinois Rule of Evidence 106 provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

This rule codifies in part the common-law completeness doctrine, which provides that if one party introduces part of an utterance or writing, the opposing party may introduce the remainder or so much thereof as is required to place that part originally offered in proper context so that a true and correct meaning is conveyed to the jury.

The common-law doctrine applies to oral statements and in that respect is broader than the rule. But the rule is broader than the doctrine in that it allows a party to introduce a writing or recording not made at the same time as the admitted writing or recording. It also allows a party to require admission of any another part or any other writing or recording at the same time as introduction of a writing or recording by the opponent, so that the statements may be considered contemporaneously by the trier of fact.

The rule did not alter the other requirements for admission under the common-law doctrine. A recording or writing may be admitted only if required to prevent the jury from being misled, to place the omitted statement in context so that a true meaning is conveyed, or to shed light on the meaning of the admitted statement. Simply because a writing or recording is related to an admitted writing or recording, or pertains to the same subject matter, does not satisfy the requirements for admission.

A recorded statement made by defendant while in custody in Milwaukee, two-and-a-half months before a recorded statement he made when he was in custody in Clarksdale, Mississippi was properly denied admission under Ill. R. Evid. 106. The court rejected defendant's argument that the Milwaukee recording was admissible because his confrontational and defiant tone in the Milwaukee recording placed the Clarksdale recording in context, in that it would have allowed the jury to infer from his defeated tone in the Clarksdale recording that his Clarksdale statements were not voluntary.

This inference was too tenuous and speculative to satisfy the requirements for admissibility under Rule 106. Rule 106 is not a means to admit evidence that aids a defendant in proving his theory of the case. Defendant had not shown that his Clarksdale statement, standing alone, was misleading, and therefore Rule 106 did not provide an avenue for admission of the Milwaukee statement. The Milwaukee recording did not shed light on the Clarksdale recording or place it in context. It merely contradicted it.

People v. Ruback, 2013 IL App (3d) 110256 Defendant's wife testified as a prosecution witness and denied that she participated with defendant in a sexual assault. The State introduced as substantive evidence her prior inconsistent statement to the police in which she implicated herself and defendant in the assault. The trial court excluded evidence that she denied the assault at the beginning of the same police interview.

1. Generally, the testimony of a witness may not be corroborated by the admission of a prior statement consistent with her trial testimony. There are two exceptions to this rule. A prior consistent statement may be introduced to rebut an express or implied charge that (1) the witness is motivated to testify falsely, or (2) her testimony is a recent fabrication. In those instances, evidence may be admitted that the witness made the same statement before the motive came into existence or before the time of the alleged fabrication. Even if the prior statement is inadmissible to rebut a charge that the witness was motivated to testify falsely

because the prior statement was made during the time the improper motive is alleged to have existed, it can be admitted to rebut a charge of recent fabrication

The State implied that defendant's wife had a motive to falsify her exculpatory trial testimony because she was married to the defendant and had communicated with him a month prior to trial. Her prior consistent statement denying the sexual assault was not admissible to rebut that charge of motive to falsify, because the defense could not show that she did not have a motive to falsify when she initially denied the allegations. At the time of the police interview, she was married to the defendant and was herself a suspect.

Her initial statement to the police was also not admissible to rebut a charge of recent fabrication. The State made no charge of recent fabrication. The mere fact that a witness's testimony has been discredited or contradicted is insufficient to allow use of a prior consistent statement because such an expansion of the exception would swallow the rule. If the only requirement necessary to trigger the exception was the existence of an inconsistent statement prior to trial, the exception would negate the rule *in toto*.

2. Under the completeness doctrine, if one party introduces part of an utterance or writing, the opposing party may introduce the remainder or so much thereof as is required to place that part originally offered in proper context so that a correct and true meaning is conveyed to the trier of fact. The remaining part is admissible only when in fairness it is required to prevent the trier of fact from receiving a misleading impression as to the nature of the introduced statement. The remaining part must concern what was said on the same subject at the same time.

Defendant's wife's statements from the beginning of the police interview denying the sexual assault were not admissible under the completeness doctrine because they "do not explain why she later denied the allegations, or qualify her later statements; they merely contradict the prior inconsistent statement admitted into evidence by the State."

Schmidt, J., specially concurred. There is only one exception to the rule against admission of prior consistent statements. A prior consistent statement is admissible to rebut a charge that a witness lied only if a motive to falsify did not exist at the time of the prior statement.

A reasonable juror would have concluded that the State did charge that defendant's wife's testimony was a lie, but her prior statement was not admissible to rebut that charge because she had a motive to falsify at the time of the prior statement. The completeness doctrine challenge was forfeited because defendant did not argue it below. Even if error had occurred, it was harmless beyond a reasonable doubt.

Holdridge, J., specially concurred. The prior statement was admissible under the completeness doctrine. It was part of the same police interview, part of which the State introduced. The statement would have established the context of the statement that the jury did hear and would have qualified that statement in the context of the wife's overall credibility. But its exclusion was harmless beyond a reasonable doubt because the evidence of guilt was overwhelming and there was nothing in the entire statement that would have been of help to the defendant.

People v. Moore, 2012 IL App (1st) 100857 Evidence of crimes for which a defendant is not on trial is inadmissible if relevant merely to establish the defendant's disposition or propensity to commit crime. Evidence of other crimes is objectionable not because it has little probative value, but because it has too much. Such evidence overpersuades the jury, which might convict the defendant only because it feels that defendant is a bad person who deserves punishment. The erroneous admission of evidence of other crimes carries a high risk of prejudice and ordinarily calls for reversal.

Given these concerns, when evidence of unrelated offenses is contained in an otherwise competent statement or confession, it must be deleted when the statement or confession is read to the jury, unless to do so would seriously impair its evidentiary value.

The completeness doctrine provides that where one party introduces part of an utterance or a writing the opposing party may introduce the remainder or so much thereof as is required to place that part originally offered in proper context so that a correct and true meaning is conveyed to the jury. The right to introduce an entire conversation or writing is not absolute, but depends on the relevancy of the additional parts that the party seeks to introduce. Otherwise inadmissible evidence may be admitted only where a defendant opens the door to such material and its exclusion would mislead the jury.

A videotape of a police interrogation of defendant contained references to: (1) a prior incident of domestic violence in which defendant punched a woman and broke her jaw after finding her with another man; defendant apparently pled guilty to this charge; (2) defendant's prior history of robberies; and (3) defendant's prior history as a drug dealer and membership in a street gang. This other-crime evidence was irrelevant and unfairly prejudicial. Had defense counsel objected to this evidence, it would have been excluded.

People v. Kaczmarek, 243 Ill.App.3d 1067, 613 N.E.2d 1253 (1st Dist. 1993) The "completeness doctrine" provides that where one party introduces part of a statement, the opposing party may introduce other parts of the statement to place the original portion in context.

People v. Pirrello, 166 Ill.App.3d 614, 520 N.E.2d 399 (2d Dist. 1988) The completeness doctrine required that the defendant be allowed to testify about the same conversation to which a State witness testified. "While this principle is usually applied so that when a single witness has testified to a part of a conversation, the opposing party is allowed to question the same witness as to the rest of the conversation, this court in [**People v. Harman**, 125 Ill.App.3d 338, 465 N.E.2d 1009 (2d Dist. 1984)] did not specify such a limitation."

People v. Davis, 130 Ill.App.3d 864, 474 N.E.2d 878 (4th Dist. 1985) Where the complainant was impeached by a prior inconsistent statement, only the portion of the statement that explained the impeachment, "by showing the correct context of the entire conversation," should have been admitted under the completeness doctrine. Furthermore, "[w]hile it may be said that the contents of the statement describing the shooting and throwing of missiles is merely cumulative, the emphasis necessarily resulting from cumulative testimony may itself be prejudicial."

People v. Perez, 101 Ill.App.3d 64, 427 N.E.2d 820 (1st Dist. 1981) Where defendant used a portion of a transcript of the complainant's testimony at an earlier hearing to impeach her, the State was properly allowed to utilize other testimony of the complainant in same transcript for rehabilitation.

§19-10(f)
Testimony About Conversations To Show Police Investigation

Illinois Supreme Court
People v. Hanson, 238 Ill.2d 74, 939 N.E.2d 238 (2010) The trial court did not err by admitting testimony by the sister of one of the decedents concerning a conversation which she had with the decedent about six weeks before the latter's death. In that conversation, the

decedent said that defendant had threatened to kill her if she told their father that defendant had obtained credit in their parents' names.

The State admitted that the statements were hearsay, but argued that defendant had forfeited his right to challenge the evidence under the "forfeiture by wrongdoing" doctrine. Under that doctrine, statements are admissible against a party who, with the intent to prevent the witness from testifying, procures the absence of the declarant from trial. The State contended that defendant murdered the decedent with the intent of keeping her from going to the police or testifying against him.

Defendant did not dispute the finding that he acted with intent to make the decedent unavailable, but argued that the doctrine of forfeiture by wrongdoing does not permit nontestimonial hearsay to be admitted. In the alternative, defendant argued that if nontestimonial hearsay can be admitted under the forfeiture by wrongdoing doctrine, the trial court must first consider whether the statements are sufficiently reliable to be considered.

The court concluded that the forfeiture by wrongdoing doctrine is not merely a basis by which the defendant's constitutional right to confrontation may be extinguished. Instead, the doctrine also constitutes an exception to the hearsay rule which allows the admission of both testimonial and nontestimonial hearsay.

Furthermore, the reliability of the statements need not be considered in determining whether statements are admissible under the forfeiture by wrongdoing doctrine. The court stressed that by intentionally preventing the declarant from testifying, the defendant forfeited his ability to challenge the reliability of the statements. "Requiring additional *indicia* of reliability would . . . undermine the equitable considerations at the center of the doctrine."

The trial court did not err by admitting a detective's testimony that while talking to the defendant, he stated that defendant's sister believed defendant had committed the murders.

A. Defendant did not waive the issue by cross-examining the witness about the statement after defense counsel's objection to admissibility was overruled. "When a circuit court makes an adverse evidentiary decision, defense counsel cannot be forced to choose between waiving an issue for appeal and allowing damaging testimony to go unanswered on cross-examination. Facing such a choice undermines counsel's ability to fully and vigorously pursue a client's interest."

B. Whether evidence is relevant and should be admitted is left to the discretion of the trial court, whose decision will not be overturned unless it is arbitrary, fanciful or unreasonable. Here, the trial court did not abuse its discretion by admitting the evidence.

1) The court rejected the argument that the testimony was improper opinion evidence. Neither the detective nor the sister testified about the sister's present opinion of defendant's guilt or innocence. Instead, the evidence concerned a conversation which occurred immediately after the offenses, when the sister reported to police that defendant might have been responsible.

2) The evidence was relevant in that it explained why the investigation had focused on the defendant, and answered defendant's earlier question to the officer about why he was being questioned.

In addition, the sister's belief was relevant to explain defendant's actions after talking to the police officer, including his unannounced return to Illinois from California and drive to Wisconsin, where he was arrested. The fact that defendant knew that his sister had shared her suspicions with the police made it more likely that he was attempting to flee.

3) The evidence was not hearsay. An out-of-court statement is admissible if offered for some purpose other than to establish the truth of the matter asserted. The evidence was not offered to prove that defendant was guilty, or even to prove that the sister thought he was guilty. Instead, it was intended to provide context for the investigation and explain defendant's state of mind when he returned to Illinois.

4) The evidence should not be excluded because the danger of unfair prejudice outweighed any probative value. The court noted that the sister was not an authority figure whose opinion was likely to be especially persuasive to the jury, the jury was not likely to believe that the sister was "uniquely knowledgeable" about defendant's role in the offense, and at no point did any witness testify that he or she believed defendant to be guilty.

People v. Lewis, 165 Ill.2d 305, 651 N.E.2d 72 (1995) Although Illinois law recognizes a hearsay exception for evidence of investigative actions where such evidence is "necessary and important to a full explanation of the State's case," evidence suggesting unrelated crimes is not admissible merely to show how the investigation unfolded. Such evidence may be admitted only if it specifically connects the defendant to the crimes for which he is being tried. Because defendant's custody in another State had nothing to do with his involvement in this crime, the evidence should not have been admitted.

However, the error was harmless where the testimony was limited to the fact that defendant was in custody in another State and did not reveal the nature of the crime allegedly committed there.

People v. Henderson, 142 Ill.2d 258, 568 N.E.2d 1234 (1990) "[T]estimony recounting the steps taken in a police investigation is admissible and does not violate the sixth amendment, even if a jury would conclude that the police began looking for a defendant as a result of what nontestifying witnesses told them, as long as the testimony does not gratuitously reveal the substance of their statements and so inform the jury that they told the police that the defendant was responsible for the crime."

It was proper for a police officer and an Assistant State Attorney to testify that after talking with a codefendant, the police began looking for the defendant. The testimony did not disclose the substance of any statements of the codefendant and properly recounted the steps taken in the police investigation.

However, the prosecutor erred in closing argument by stating that the codefendant was "kind of helping" and gave "certain information" about the defendant, because such comments improperly suggested the content of the codefendant's statement. See also, People v. Jura, 352 Ill.App.3d 1080, 817 N.E.2d 968 (1st Dist. 2004) (there is a distinction between testimony that an officer merely spoke to a witness and then took certain actions, and testimony which discloses the substance of the conversation; under the "investigatory procedure" exception to the hearsay rule, testimony must be limited to showing how the investigation was conducted, without introducing the substance of the out-of-court statements; before admitting statements under the "investigative procedure" exception, the trial court must determine whether: (1) the out-of-court statements are relevant to an issue which does not involve the truth of the matters asserted, and (2) the risk of unfair prejudice and possible misuse by the jury outweighs the legitimate evidentiary value of the statements; plain error occurred where three police officers gave detailed testimony concerning hearsay statements which led to defendant's arrest and the prosecutor relied on the hearsay in opening and closing statements).

People v. Gacho, 122 Ill.2d 221, 522 N.E.2d 1146 (1988) For the purpose of showing the investigative procedure of the police, an officer may testify that he had a conversation with others (such as victims and witnesses) during his investigation. Such testimony is not hearsay, because the substance of the conversations are not disclosed and the evidence is not offered to prove the truth of matters in the conversations. Also, such testimony is admissible even though it might suggest that the nontestifying witness implicated the defendant in the crime.

The Court noted the distinction between testimony that a conversation occurred and testimony which reveals the substance of such conversation — the former testimony is admissible to show investigatory procedure, while the latter is hearsay and improper.

People v. Johnson, 116 Ill.2d 13, 506 N.E.2d 563 (1987) At the defendant's trial for murder, the State presented testimony that two nontestifying codefendants made statements implicating the defendant in the crime. The Supreme Court held that the State's use of the above hearsay testimony violated the defendant's confrontation rights under the U.S. and Illinois Constitutions; "even if the evidence had nonhearsay uses and was therefore proper, the State abandoned those uses in closing argument . . . [when] the prosecutor invited the jury to consider [the hearsay] as substantive evidence of guilt."

The Court rejected the State's contention that the testimony was proper to explain the investigatory procedure followed by the police. Testimony recounting steps taken in the course of an investigation may be admissible without violating a defendant's confrontation rights, even though the officer's description of the case might suggest that nontestifying witnesses implicated the defendant. The testimony presented here went beyond that, however; the detectives did more than simply recount what had been done, and revealed that the codefendants "directly implicated the defendant in these crimes."

Illinois Appellate Court

People v. Williams, 2023 IL App (1st) 192463 The appellate court reversed defendant's murder conviction and remanded for a new trial because the trial court and State exceeded the limitations on course-of-investigation testimony.

Police responded to a "shots fired" call, and pursued the suspects' car until it crashed. Inside the car, the officers found three occupants and a gun that would eventually be linked to a robbery and murder from the prior week. The officers spoke to the three occupants, who told them that a fourth occupant – defendant – had fled, and that he was responsible for the robbery and murder. Based on this information, the officers created a photo array, which they showed to one of the complainants. This first eyewitness identified defendant as the man who robbed him and shot and killed his friend. A second eyewitness also provided a statement concerning the offense. Based on these statements, the police issued an investigative alert for defendant. The first eyewitness would testify at trial; the second was deceased by the time of trial.

Before trial, the parties argued over the admissibility of the "shots fired" call, the car chase, and the conversation between the police and the occupants of the car. The trial court ruled that the "shots fired" call and the car-chase evidence was admissible to show course of investigation. But it ruled that a limiting instruction would be required. The court also ruled that the State could not inform the jury that the occupants identified defendant as the perpetrator.

The officers testified accordingly, describing the call and dash-cam footage of the car chase, while limiting their testimony about the occupants to the fact that they spoke to them, after which they created a photo array from which the first eyewitness identified defendant.

They also testified that the second eyewitness provided a statement, which led to an investigative alert for defendant. A defense objection to this testimony was overruled.

In closing, the State argued, over objection, that the jury could infer from the officers' testimony that defendant was in the car with the three other occupants, and that the reason he fled was because of his connection to the gun found in the car. The State further suggested that the jury could infer that the occupants of the car implicated defendant in the offense. The jury found defendant guilty of murder.

The appellate court remanded for a new trial, finding several errors. The court first held that the trial court committed two errors in its handling of the "shots fired" call and the car chase. First, although the "shots fired" call was admissible for the limited purpose of explaining why the police were on the scene and stopped the car, a limiting instruction was needed to ensure the jury did not consider the evidence against defendant. Second, because the "shots fired" call explained the reason for the officers' presence on the scene, the car chase footage was irrelevant, unnecessary, and prejudicial.

The trial court also erred when it overruled the defense objection to the testimony about the second eyewitness's statement. This information was not necessary to explain the course of investigation, because the existence of the first eyewitness's statement was sufficient to explain the officers' decision to issue an investigative alert. Thus, the existence of a second statement, inadmissible substantively given the defendant's inability to cross-examine the deceased witness, had no probative value.

The appellate court also held that the State's closing argument about the officers' interaction with the car's occupants constituted misconduct. The State exceeded the bounds of the course-of-the-investigation evidence when it argued that the jury could infer from the officers' testimony that defendant had been in the car, that he likely fled because the gun was his, and that the occupants must have implicated him in the robbery and murder. To make these inferences, the jury would have to assume the existence of the very hearsay – the occupants' statements to the officers implicating defendant – that the limitation on the course-of-investigation evidence sought to avoid.

The appellate court reversed and remanded for a new trial. The errors were prejudicial in a case with a single eyewitness who recanted his prior identification at trial, and where the improperly admitted evidence was not cumulative of any other evidence admitted at trial.

People v. Harris, 2022 IL App (1st) 192509 The trial court erred when it overruled an objection to police testimony detailing a conversation with two potential witnesses at defendant's murder trial.

Surveillance video captured a gunman in a black hoody run into an apartment building. Defendant's friend, Teon, testified he lived in the apartment building, and that defendant came to his apartment on the day in question. Shortly after the gunman entered, Teon could be seen on the video leaving the apartment with someone in a blue hoody.

A police officer testified that he found a black hoody on Teon's bed, and that Teon stated that it wasn't his. The officer also testified that he showed the hoody to Teon's mother, and she denied having seen it before. The police collected the hoody and submitted it for DNA testing. The defense, alleging hearsay, objected to the statements of Teon and his mother as relayed by the officer.

The Appellate Court agreed this testimony violated the rule against hearsay. Although course-of-investigation testimony is admissible, the testimony should be limited to: (1) the fact that there was a conversation, without disclosing its content; and (2) what the police did after the conversation concluded. Here, the State elicited the actual content of the discussions. This was unnecessary to explain the investigation, because Teon already

testified that he did not put the sweatshirt on the bed, and the totality of the evidence clearly explained why the police would collect the hoody and submit it for DNA testing.

The improper evidence tended to support the State's theory that defendant entered the apartment and removed his sweatshirt after the shooting, by establishing that it did not belong to Teon. But the error was harmless because the State also presented DNA evidence linking the black hoody to defendant. Thus, there was no reasonable possibility that the verdict would have been different had the hearsay been excluded.

People v. Sardin, 2019 IL App (1st) 170544 The State did not violate defendant's confrontation rights when it elicited course-of-investigation testimony from a police officer. The officer testified that he spoke with the mother of an eyewitness, returned to the police station and generated a photo array with defendant. Defendant argued this created the inference of an inadmissible out-of-court identification by the mother, but the Appellate Court disagreed. Where the context of a nontestifying witness' statement is not revealed, the mere fact that the jury could infer that something the nontestifying witness said caused the police to suspect the defendant does not necessarily mean that the defendant has the right to cross-examine the nontestifying witness. Here, the officer never made a direct connection between the conversation and the identification of defendant as a suspect – for instance, by stating that "based on the conversation" they were "looking for" defendant, as in **People v. Sample**, 326 Ill. App. 3d 914 (1st Dist. 2001).

People v. Ochoa, 2017 IL App (1st) 140204 For the purpose of showing the investigative procedure of the police, an officer may testify that he had conversations with others during his investigation. Such testimony is not hearsay because the substance of the conversations is not disclosed and the evidence is not offered to prove the truth of matters asserted. Such testimony is admissible even though it might suggest that a non-testifying witness implicated the defendant in the crime.

Where evidence is admitted to show the steps in an investigation, there is a distinction between testimony which discloses that a conversation occurred and testimony which reveals the substance of such a conversation. The former is admissible to show investigatory procedure, while the latter constitutes inadmissible hearsay. Testimony that a third party made statements implicating the defendant is especially prejudicial where the statements were made by a co-defendant who does not testify and cannot be cross-examined.

Thus, out-of-court statements that explain a police investigation should be admitted only to the extent necessary to provide that explanation and should not be admitted if unnecessary and prejudicial information is revealed. The investigatory procedure exception may be used to place into evidence the substance of an out-of-court statement only to the extent necessary to establish the police investigative process. Furthermore, when such evidence is admitted, the trial court must give an instruction informing the jury that the testimony was introduced for a limited purpose and may not be accepted for its truth.

Inadmissible hearsay was admitted under the guise of the investigatory procedure exception where officers revealed the substance of statements by co-defendants to the extent that the jury could infer that co-defendants implicated defendant. The court criticized the State for engaging in "serial" questioning "to build the inference that defendant was named by his criminal cohorts." Because the evidence was not limited to conveying the investigatory steps taken by the police and suggested that defendant had been implicated in the offense, the scope of the investigatory procedure exception was exceeded.

The court also noted that the State reinforced the improper inference by reminding the jury during closing arguments that the co-defendants had implicated defendant.

Furthermore, the trial court failed to provide a limiting instruction. Finally, the evidence was prejudicial because the only evidence other than the improper hearsay was defendant's statement, which was recorded in English (although defendant only spoke Spanish) and was translated by an uncertified translator who had limited experience with the Spanish language.

Defendant's conviction was reversed and the cause remanded for a new trial.

People v. Boling, 2014 IL App (4th) 120634 A police officer may testify concerning steps taken in investigating a crime where such testimony is required to fully explain the State's case. However, out-of-court statements admitted to explain the course of an investigation are admissible only to the extent necessary to provide that explanation, and should not be admitted if they reveal unnecessary and prejudicial information. Furthermore, testimony about the steps of an investigation may not include the substance of conversations with non-testifying witnesses. In addition, evidence which would suggest that the defendant engaged in prior criminal activity is admissible only if it is relevant and specifically connects the defendant with the crime for which he is being tried.

Here, the court applied the principles of the "police investigation" hearsay exception although the witnesses in question - the mother and aunt of the complainant - were civilians rather than law enforcement agents. In applying the principles underlying the exception, the court noted that the two witnesses "conducted something akin to an investigation into defendant's suspected abuse" of the complainant.

However, the court concluded that the evidence went well beyond what was necessary to explain the decision to investigate information about the possible abuse, because both witnesses testified either directly or indirectly about the substance of conversations and suggested that defendant had been previously accused of sexual improprieties with children. The court rejected the State's argument that it elicited the testimony because it had a legitimate need to explain its case, noting that the prosecutor could have limited the evidence to showing that based upon information obtained from a third party, the women decided to have a discussion with the complainant about "good" and "bad" touches. Had the evidence been presented in such a manner, the exact information and its source would not have been revealed.

The court also noted that in prior cases, it suggested that a trial judge faced with the possibility of admitting evidence explaining the steps of a police investigation should conduct an *in camera* hearing to determine what statements will be permitted. **People v. Cameron,** 189 Ill.App.3d 998, 546 N.E.2d 259 (4th Dist. 1989). Such a hearing would have been appropriate here although the evidence concerned lay rather than police testimony. In addition, although defendant failed to raise a formal objection to the testimony, the trial court had ample warning through the §115-10 hearing that hearsay concerning the defendant's prior crimes would be elicited at trial. Under these circumstances, the trial court should have *sua sponte* exercised its discretion to hold an *in camera* hearing.

The court concluded:

[Twenty-five] years after **Cameron**, the State continues to commit error by introducing unduly prejudicial out-of-court statements for the purported purpose of explaining the steps of an investigation. . . . The State's repeated abuse of this limited exception to the hearsay rule — in the face of repeated condemnation from the Appellate Court — shows a disrespect for the fundamental purpose of the hearsay rule. . . . [T]rial courts and courts of review should begin more closely scrutinizing (1) the State's purported need to offer hearsay statements to explain the steps of an investigation, as well as (2) the potential prejudice

resulting from such evidence. In other words, the time is long overdue for trial courts to *routinely* be conducting "**Cameron** hearings."

5. Because the State's case in a prosecution for sex offenses against a child was based on the credibility of minor witnesses, the court found that the evidence was closely balanced. Thus, the plain error rule applied. Because defendant was denied a fair trial by the cumulative effect of several errors including the erroneous admission of hearsay evidence, allowing a prosecution witness to testify concerning the credibility of the complainant, and commenting in closing argument on the credibility of witnesses, the convictions were reversed and the cause remanded for a new trial.

In re Jovan A., 2014 IL App (1st) 103835 The Appellate Court reversed the minor's delinquency adjudication and remanded for further proceedings after finding that the trial judge improperly relied on inadmissible hearsay to establish the minor's guilt. The exception for statements made in the course of an investigation has been applied only to testimony by law enforcement officers, and not to testimony by lay witnesses who conducted private investigations. The court found that it need not consider the State's argument that the exception should be extended to lay witnesses because even if the exception did apply, the testimony in this case would have exceeded the scope of the exception. The witness testified not only to the steps which she took in her private investigation, but also to the content of the craigslist.org advertisement which led her to a bicycle which had been stolen a few minutes earlier.

A police officer testified that the lay witness told him that a stolen bicycle was being sold on craigslist.org. The officer testified that he viewed the website, found a telephone number, and obtained related names, addresses and car registration information. The officer also testified that when he arrested the respondent he called the phone number listed in the advertisement, and the respondent's cellular phone rang.

The Appellate Court concluded that because the detective was a police officer acting in the line of duty, the "course of an investigation" exception applied to the portions of his testimony stating that he viewed the advertisement, obtained information concerning a car, went to a particular address where he observed the car, and arrested the respondent. Such testimony qualified for the investigation exception because it explained the steps the detective took which resulted in the respondent's arrest.

However, the trial court improperly admitted other portions of the detective's testimony, including that the layperson told him that the bicycle was being sold on craigslist.org, the detective called the number listed in the advertisement, and the respondent's cellular phone rang. The court stressed that the investigation exception does not allow an officer to testify to the content of a statement, and that the content of the advertisement related directly to the essence of the dispute at trial - whether the respondent was the person who stole the bicycle. Furthermore, the content of the advertisement was not necessary to explain the course of the detective's investigation.

Erroneous admission of hearsay requires reversal unless the record shows that the error was harmless. To determine whether this standard has been satisfied, the reviewing court must ask whether there is a reasonable probability that the trier of fact would have been acquitted had the hearsay been excluded.

The court concluded that the erroneous admission of the hearsay was not harmless where, although there was some evidence that the bicycle in question was the one which had been stolen a few minutes earlier, the trial court's oral pronouncement showed that it relied not on the properly admitted evidence but entirely on the improper hearsay, which it

considered for its truth. Under these circumstances, there was a reasonable probability that the trier of fact would have acquitted the respondent had the hearsay been excluded.

The court acknowledged that there is a presumption that a trial judge sitting as trier of fact considered only competent evidence. The court concluded that the presumption was overcome because the record affirmatively showed that the judge considered the hearsay for its truth when it found that the respondent had stolen the bicycle. The Appellate Court acknowledged that had the trial court based its finding solely on admissible evidence, reversal would not be required.

People v. Shorty, 408 Ill.App.3d 504, 946 N.E.2d 474 (3d Dist. 2011) An officer may testify to his investigatory procedures, including the existence of conversations, but not the substance of the conversations, without violating the hearsay rule, even if the logical inference is that the officer took subsequent steps as a result of the substance of those conversations. The testimony may not be used to establish defendant's guilt, or go beyond what is necessary to explain the police conduct. This rule is not violated where the substance of the conversation is irrelevant to the matter in controversy.

The State went beyond what was necessary to explain the investigatory procedure, and the substance of the elicited conversations related directly to the matter in controversy: whether the defendant possessed the heroin. The prosecutor elicited that a confidential informant told the police that defendant would be going to Chicago to buy heroin; that defendant would be going to Chicago that evening to pick up a large quantity of heroin; and that defendant did in fact have the heroin. The Appellate Court characterized the hearsay testimony of the informant as nothing "more than a prosecutor's successful attempt to put on the not-so-confidential informant's testimony as to defendant's guilt without subjecting the witness to cross-examination and impeachment."

The court instructed that upon defense objection to the substance of information related to the police, a hearing should be conducted outside the presence of the jury to determine the scope of the out-of-court statements and the need for the jury to hear them. This allows the court to decide how much of the substance of the conversation is necessary to explain why the police did what they did and exclude prejudicial testimony that the jury might use to decide defendant's guilt.

A limiting instruction to the jury did not cure the error, particularly where it was not given in each instance that hearsay was elicited. The error was harmless however, because there is no reasonable probability that the jury would have acquitted absent the error, as the evidence that the police saw defendant in possession of the bag containing the heroin was uncontradicted.

People v. Shorty, 403 Ill.App.3d 625, 934 N.E.2d 647 (3d Dist. 2010) An officer may testify that he had a conversation with someone to explain his investigatory procedure. The officer may not testify to the substance of that conversation where the substance relates directly to the matter in controversy at trial.

A police officer's testimony relating the substance of his conversation with an informant should not have been admitted to explain the officer's investigatory procedure because it went beyond that necessary for that purpose and related directly to the charges. The defendant was on trial for possession of heroin and possession of heroin with intent to deliver. The information that the officer disclosed was that an informant told him that defendant was taking a trip to Chicago to pick up a large quantity of heroin and that defendant had in fact obtained the heroin. Instructing the jury not to consider the evidence for its truth did not cure the error. The court concluded that the prosecutor elicited the

evidence to place the testimony of the informant before the jury without subjecting the witness to cross-examination and impeachment.

People v. Edgecombe, 317 Ill.App.3d 615, 739 N.E.2d 914 (1st Dist. 2000) A police officer exceeded the scope of the hearsay exception for testimony concerning a police investigation where he repeated the contents of a radio dispatch concerning the stop of a vehicle which matched the complainant's description of the getaway car, including that the occupants fled and the complainant later identified the vehicle and one of the occupants. The exception authorizes only evidence necessary to establish the steps of the police investigation.

People v. Virgin, 302 Ill.App.3d 438, 707 N.E.2d 97 (1st Dist. 1998) The contents of a warrant may be admitted for the limited purpose of explaining the officers' conduct. Where the State used the evidence to prove that the defendant, and not his father, was the person who fit the warrant's description of the offender and therefore must have been the person who possessed cocaine, the evidence went beyond an explanation of investigatory procedure and was therefore improper.

People v. Mitran, 194 Ill.App.3d 344, 550 N.E.2d 1258 (2d Dist. 1990) Testimony admitted under the investigative procedure exception "must be limited to show how the investigation was conducted . . . [and] cannot be used to place into evidence the substance of any out-of-court statements or conversations for the purpose of establishing the truth of their contents."

People v. White, 192 Ill.App.3d 55, 548 N.E.2d 421 (1st Dist. 1989) Although a police officer's testimony was properly admitted to explain the officer's investigatory procedure, the prosecutor erred in closing argument by exceeding the limited purpose for which the evidence was admitted.

People v. Billingsley, 184 Ill.App.3d 142, 539 N.E.2d 1302 (2d Dist. 1989) At the defendant's trial for residential burglary, a police officer testified that an informant implicated the defendant in a theft which occurred the night before the residential burglary. Based upon this information, the officer set up surveillance which resulted in defendant's arrest.

The Appellate Court held that the above testimony was not hearsay because it did not implicate the defendant in the crime charged and was not used to prove the truth of the matter asserted. Rather, the testimony was used to explain the officer's investigatory procedures — why he set up the surveillance.

People v. Wilson, 168 Ill.App.3d 847, 523 N.E.2d 43 (1st Dist. 1988) Police officer testified that he had a conversation with an accomplice and then proceeded to gather information on the defendant. This testimony was proper since the officer did not reveal the contents of the conversation.

People v. Spears, 169 Ill.App.3d 470, 525 N.E.2d 877 (1st Dist. 1988) A police officer testified that during the investigation an unidentified person told him, "I think the one you are looking for is Larry Spears." While the officer could properly testify about having a conversation with an unidentified person, it was error to testify about the substance of the conversation.

People v. Hyche, 91 Ill.App.3d 559, 414 N.E.2d 1142 (1st Dist. 1980) Police officer testified that he responded to a radio call concerning a shot being fired and a woman screaming for help at a certain location. This testimony was held to be proper because it was admitted merely to preliminarily inform the jury concerning the investigatory procedure taken by the police, which brought them to the scene.

§19-11
Admissions: Exculpatory and False Exculpatory Statements

Illinois Supreme Court
People v. McDaniel, 164 Ill.2d 173, 647 N.E.2d 266 (1995) The "admission of a party opponent" exception to the hearsay rule does not apply to out-of-court statements made by agents of the State in a criminal case. Because governmental agents "are supposedly disinterested in the outcome" of criminal cases and are "unable to bind the sovereign," their statements "seem less the product of the adversary process and hence less appropriately described as admissions of a party."

People v. Cruz, 162 Ill.2d 314, 643 N.E.2d 636 (1994) The Supreme Court declined to decide whether the defendant should have been allowed to show that the State changed its theory of the crime between the first and second trials. There is no Illinois case on point concerning whether an attorney's admissions during argument at an earlier trial are admissible as admissions during a subsequent trial on the same matter. Although the Court discussed federal precedent, it held that it need not resolve the issue because a new trial was required on other grounds.

People v. Kidd, 147 Ill.2d 510, 591 N.E.2d 431 (1992) Acknowledging that the issue was one of first impression, the Supreme Court held that statements made during dreams are not sufficiently trustworthy and reliable to be used as admissions. The Court remanded the cause for a new trial with instructions to review the conflicting testimony and determine whether defendant was asleep when he made the statements in question. If the trial judge concludes that defendant was probably sleeping, the statements are to be excluded.

People v. Henderson, 142 Ill.2d 258, 568 N.E.2d 1234 (1990) The State introduced the defendant's entire statement, which included not only an admission of guilt regarding the crimes on trial, but also a statement that he intended to murder another person. The Court held that the portion of the statement relating to defendant's intent to kill another person was not relevant and should have been redacted.

People v. Stewart, 105 Ill.2d 22, 473 N.E.2d 840 (1984) An admission is a statement or conduct from which guilt may be inferred, when taken in connection with other facts, but from which guilt does not necessarily follow. The defendant's statement that the murder victim had previously turned him over to the police "was relevant to show motive, and the jury could have inferred guilt when that statement was taken in connection with all the other evidence." Thus, the statement was an admission and not a violation of the rule against hearsay.

People v. Aughinbaugh, 36 Ill.2d 320, 223 N.E.2d 117 (1967) Defendant's silence may be introduced as a tacit admission where it occurred in the face of an accusation of guilt. However, such evidence should be received with caution and only when it affirmatively

appears that the defendant was being asked about the crime on trial - for it is the assumption that one similarly situated would deny the imputation of guilt which renders admissible defendant's failure to do so. See also, **People v. Harbold**, 124 Ill.App.3d 363, 464 N.E.2d 734 (1st Dist. 1984) (where defendant was present during the conversation but did not adopt the declarant's statements, the statements were hearsay).

People v. Jones, 26 Ill.2d 300, 186 N.E.2d 314 (1962) The defendant may not introduce his own self-serving, and exculpatory hearsay denying commission of the offense

Illinois Appellate Court

People v. Serritella, 2022 IL App (1st) 200072 At defendant's murder trial, the teenage victim's mother testified that she received a telephone call from defendant several years after the murder had occurred. During the call, the mother told defendant that she had "a gut feeling" that he killed her son and asked him why he had done so. After a short pause, defendant responded that he had never met her son and did not kill him. A recording of the call was admitted into evidence at defendant's trial. In closing, the prosecutor argued that defendant's silence before answering was indicative of his consciousness of guilt. Defendant argued that admission of the victim's mother's accusation was unfairly prejudicial, irrelevant, and not based on personal knowledge. The court rejected these arguments, noting that the trial judge at a bench trial is presumed to consider only proper evidence.

After briefing, defendant was given leave to cite additional authority, specifically **People v. Allen**, 2022 IL App (1st) 190158, which he relied upon to support an additional argument that admission of the recording violated the tacit admission rule. The court found this argument forfeited. The State had consistently argued that defendant's pause showed consciousness of guilt, and defendant chose not to raise the tacit admission rule at any time prior to the motion to add authority. The tacit admission rule was well-established at the time of trial, and thus defendant could have raised it in the trial court or in the original briefing in the Appellate Court.

The court went on to find that even if it overlooked forfeiture, defendant's argument was without merit. Under the tacit admission rule, a defendant's silence may be introduced as a tacit admission of guilt if a statement is made that incriminates the defendant such that the natural reaction of an innocent person would be to deny it, and instead defendant is silent. The victim's mother's statement was accusatory, and defendant clearly paused before responding rather than immediately denying the accusation. And, defendant did not know the call was being recorded and had not yet been arrested, so his pause could not be attributed to his contemplating the exercise of his **Miranda** rights.

People v. Allen, 2022 IL App (1st) 190158 The trial court erred when it admitted a recording of defendant's phone call from jail with his mother under the tacit admission rule.

Statements of a party opponent are considered non-hearsay, including "a statement of which the party has manifested an adoption or belief in its truth." Ill. R. Evid. 801(d)(2). Under this exception, known as the "tacit admission rule," the defendant's silence in the face of an accusation of guilt may be introduced at trial as evidence of guilt. The Illinois Supreme Court has held, however, that such evidence "should be received with caution and only when the conditions upon which it becomes admissible are clearly shown to exist."

The necessary elements for admissibility under the tacit admission rule are "(1) that the statement incriminates the defendant such that the natural reaction of an innocent person would be to deny it, (2) that the defendant heard the statement, and (3) that the defendant had an opportunity to reply or object and instead remained silent."

Here, defendant's mother asked if he was innocent, and defendant, after a short pause, responded with a long "uhhh." Defendant's mother responded "alright" and defendant affirmatively replied "uh huh."

The tacit admission rule could not apply here because the question was not an incriminating statement portraying defendant as a participant in illegal activity but rather an inquiry about whether he was innocent. The tacit admission rule applies when defendant is accused of criminal activity, not when asked if he's innocent. Regardless, even if the rule could apply, defendant did ultimately appear to affirm his innocence when he said "uh huh." Because the conviction was reversed on other grounds, the recording would not be admissible on retrial.

People v. Saulsberry, 2021 IL App (2d) 181027 The Appellate Court rejected defendant's assertion that improper evidence was admitted at his murder trial. First, defendant argued improper other crimes evidence was admitted when an accomplice testified that prior to the shooting, defendant had been "hunting" for opposing gang members. The Appellate Court questioned whether this was even other crimes evidence because it described defendant's behavior leading up to the crime itself. Regardless, the evidence was admissible to show motive.

Second, a gang member witness testified that, after the murder, when defendant entered a room with a gang leader, the leader told the witness to shake defendant's hand because he was the one who "took care of it." The Appellate Court found the handshake and the comment were nonhearsay, admitted not for the truth of the matter asserted but rather to show the effect on the witness. Defendant pointed out that **In re Zariyah A.**, 2017 IL App (1st) 170971, **People v. Hardimon**, 2017 IL App (3d) 120772, and **People v. Theis**, 2011 IL App (2d) 091080, all held that incriminating nonhearsay, even if admissible to show the effect on the listener, should only be admitted when necessary. The Appellate Court rejected these holdings, finding no need for a heightened standard where the evidence could be excluded if its prejudicial effect substantially outweighed the probative value. Here, the witness used the statement to explain why he shook the hand of defendant, a lower-ranking gang member. And while a limiting instruction may have been possible, the defense forfeited this option by not requesting the instruction below.

The court did note, however, that the statement could not be admitted as a tacit admission, where the record did not show defendant had an adequate opportunity to hear and respond to the accusation.

People v. Little, 2021 IL App (1st) 181984 The trial court did not abuse its discretion by admitting recordings of phone calls defendant made from jail. The State offered sufficient foundation through the testimony of a correctional officer who listened to and downloaded the recordings and testified that the jail's telephone system required a PIN and voice recognition identification before a call could be initiated. This testimony established the capability and accuracy of the jail's phone system at the time of the calls.

People v. McCallum, 2019 IL App (5th) 160279 Trial judge did not abuse his discretion in denying defendant's motion to bar admission of a redacted recording of his second police interview. Statements of investigators during questioning are generally admissible to demonstrate defendant's responses or the effect of the investigator's statements on defendant. Here, admission of the second interview was necessary to place the first interview in context. While defendant did not make an admission during the interview, his responses were relevant in that he did change his story during the second interview, and he showed a

lack of remorse about the deaths of his friends. Further, the interview was not an integral part of the State's case against defendant, and defense counsel actually used the interview to show that defendant had consistently maintained his innocence. In reaching this conclusion, the court distinguished **People v. Hardimon**, 2017 IL App (3d) 120772, where the majority of the recorded interview that was admitted at trial contained irrelevant and highly prejudicial comments, the police were overly aggressive, and defendant had not changed his version of events in response to ongoing questioning.

People v. Colon, 2018 IL App (1st) 160120 Out-of-court statements by third parties were admissible under the tacit admission exception to the hearsay rule. According to the witness, the defendant was present while the declarants described the crime and implicated defendant, and defendant, who would have heard the statements, did not dispute them despite having an opportunity to object.

The trial court did not abuse its discretion when it admitted testimony that a witness identified defendant and another suspect in a lineup because they "kind of looked like" the offenders. The testimony met the broad definition of "statements of identification" under Rule 801 and as interpreted by **People v. Tisdel**, 201 Ill. 2d 210 (2002). Any deficiencies in the identification were explored in cross-examination.

People v. Kent, 2017 IL App (2d) 140917 As a matter of first impression in Illinois, the Appellate Court held that in order to authenticate a Facebook post for admission in a criminal trial, the proponent must produce evidence that is sufficient to allow a reasonable juror to find that the evidence is in fact what it is claimed to be. Evidence of authentication may be direct or circumstantial, but the most common form is the testimony of a witness with knowledge of the nature of the evidence. In addition, some evidence can be authenticated by the combination of all the relevant circumstances and the distinctive characteristics of the item such as appearance, contents, substance, or internal patterns.

Defendant was charged with a murder in which the decedent was killed in his driveway. A police officer testified that on the day after the offense, he used a fake profile to search Facebook. He testified that he found a profile under a name and nickname that were similar to defendant's along with a photograph which resembled defendant and an undated posting which stated that "its my way or the highway . . . leave em dead n his driveway." The officer did not know when the post had been created, but he testified that it was deleted later the same day.

The court concluded that there was no evidence to justify a reasonable conclusion that defendant created the post or was responsible for it. Thus, the foundation was insufficient to justify use of the Facebook post as an admission by defendant. Defendant did not admit to creating the Facebook profile or making the post, and was not observed composing the communication. The State presented no Facebook records to indicate that the IP address used to create the profile or the post was in any way associated with defendant, and failed to even connect defendant to the last name used in the profile.

The court acknowledged that there was some circumstantial evidence of authentication in defendant's nickname, the fact that the decedent was killed in his driveway, and the photograph allegedly resembling defendant, but noted that the record failed to show that such matters were not public knowledge which could have been used to create the profile without defendant's awareness. The court stressed the ease of creating false Facebook pages and the fact that no verification of identify is required to create a Facebook profile. Even the detective's testimony that the post had been "deleted" is questionable, as the person who

created the post could have changed the privacy settings in a way that merely denied public access to it.

The court stated, "At best, the photograph and the name on the Facebook profile are *about* defendant and not evidence that defendant himself had created the post or was responsible for its contents. . . . The ease in fabricating a social media account to corroborate a story means that more than a 'simple name and photograph' are required to sufficiently link the communication to the purported author."

Because the trial court improperly admitted the Facebook post, and because the State argued the existence of the post as an admission by defendant that he had committed the murder, reversible error occurred. The conviction was reversed and the cause remanded for a new trial.

People v. James, 2017 IL App (1st) 143391 IPI 3.06-3.07, regarding statements of the defendant relating to the charged offense, contains bracketed language requiring the jury to determine "whether the defendant made the statements." The language should be removed only when the defendant admits he made the statements at issue. In this case, the defendant argued the trial court erred in removing the language where he never admitted to making the statements at issue – various commands and threats leveled by the offenders at the complainants during a home invasion. The Appellate Court held that "statements relating to the charged offense" do not refer to the types of threats or commands at issue in this case, which are more accurately characterized as "utterances." Rather, the history of the instruction reveals that it was intended to cover admissions or confessions. Thus, the error was not in omitting the bracketed language, but in giving the instruction at all. But this error was forfeited, and regardless, harmless. Even if the jury used the instruction to analyze the utterances, and would have determined that the co-defendants, and not defendant, made them, the outcome could not have changed because the defendant was tried under a theory of accountability.

People v. Watson, 2012 IL App (2d) 091328 A judicial confession is a voluntary acknowledgment of guilt during a judicial proceedings such as a plea of guilty, testimony at trial or testimony at some other hearing. To constitute a judicial confession, the statement must directly acknowledge guilt or directly and necessarily imply guilt.

1. Defendant's statements in allocution may be read to suggest his guilt, but may also be read as an expression of remorse for his life of crime generally, and not specifically to this offense. Therefore, they are too vague to be considered a judicial confession.

2. Statements made by defendant in his examination of witnesses at a hearing on his post-trial motion challenging the competency of his counsel did not qualify as judicial confessions. Defendant offered no guilty plea or personal testimony at that hearing. The evidence at that hearing revealed that defendant and his counsel disagreed about whether defendant should adopt the trial strategy of making a judicial confession at trial, and established that defendant entertained pleading guilty. But defendant ultimately did not make a judicial confession or plead guilty.

People v. Gray, 406 Ill.App.3d 466, 941 N.E.2d 338 (1st Dist. 2010) A guilty plea is an admission to the elements of the charged offense. It does not constitute an admission to collateral matters.

A defense witness pled guilty to illegal possession of a weapon, a charge related to the first degree murder and aggravated battery charges for which defendant was tried. The factual basis presented by the prosecutor at the plea hearing included a statement that the

witness had given the gun to the defendant and the defendant had fired shots that resulted in the death of the murder victim. After the witness testified at defendant's trial that defendant had not been the shooter, the prosecutor introduced the factual basis for the plea to impeach the testimony of the witness.

By pleading guilty to the gun charge, the witness admitted that she possessed a gun illegally. Her plea was not an admission that she gave the gun to the defendant or that he fired the gun, because those collateral facts had no bearing on the elements that the State had to prove to establish her guilt of the weapons offense. Neither at the time of the plea nor at the time of defendant's trial did the witness assent to the collateral matters presented by the prosecutor in the factual basis for the plea. Therefore, the factual basis did not constitute a judicial admission or a prior inconsistent statement that could be used to impeach the testimony of the witness.

People v. Sanchez, 392 Ill.App.3d 1084, 912 N.E.2d 361 (3d Dist. 2009) Because the defendant's post-arrest silence is neither material nor relevant to proving or disproving a charged offense, Illinois evidentiary law prohibits the impeachment of a defendant with his or her post-arrest silence, regardless whether the silence occurred before or after **Miranda** warnings were given. Furthermore, constitutional error occurs where the defendant is impeached with post-arrest silence which occurred after **Miranda** warnings were given.

However, a defendant who gives exculpatory testimony that is manifestly inconsistent with statements he made after his arrest may be cross-examined about the inconsistency.

As a matter of plain error, the State committed reversible error by using post-arrest silence to impeach a defendant who did not testify. Because defendant's alibi defense was presented through the testimony of other witnesses, the State was entitled to impeach those witnesses. However, it had no basis to impeach a non-testifying defendant.

Defendant's convictions were reversed and the cause remanded for a new trial.

People v. Downin, 357 Ill.App.3d 193, 828 N.E.2d 341 (3d Dist. 2005) Two printed versions of e-mails purportedly sent by the defendant to the complainant, and which contained admissions of guilt, had sufficient foundation to be admitted. Defendant argued that because the emails did not have any Internet provider address linking the email to the defendant, there was no way to tell whether they had been falsified.

The decision to admit a document is reviewed under an abuse of discretion standard. A finding that there is an adequate foundation to admit a document is merely a finding of sufficient evidence to justify presenting the evidence to the trier of fact; the opponent of the evidence is not precluded from contesting the genuineness of the document or the weight it should be given. In order to establish a sufficient foundation for the admission of the e-mails, the prosecution was required to show a rational basis upon which the factfinder could conclude that the messages had been sent by the defendant. The factors used to authenticate writings in general also apply to e-mail messages.

Among the methods of establishing authorship of a document is showing that the writing reflects knowledge of an obscure matter known to only a small group of individuals. The court found that there was a rational basis to believe that the e-mails were genuine where: (1) the defendant and complainant communicated by e-mail, (2) the complainant sent an e-mail at a police officer's request to the same e-mail address she had used in the past to contact the defendant, (3) the complainant testified that she received a response from the defendant's e-mail address to her e-mail address, and (4)that e-mail was responsive to the message the complainant had sent.

People v. Slabaugh, 323 Ill.App.3d 723, 753 N.E.2d 1170 (2d Dist. 2001) Defense witnesses could not be impeached with their guilty pleas to charges of obstructing a peace officer which arose from the same incident as the charges against the defendant. Obstructing a peace officer is a misdemeanor that does not involve dishonesty or false statement, and a guilty plea is neither a judicial admission nor a prior statement that is inconsistent with a witness's denial that he or she committed certain acts.

People v. Long, 316 Ill.App.3d 919, 738 N.E.2d 216 (1st Dist. 2000) The trial judge erred by allowing the State to cross-examine defendant as to why she had not mentioned, before trial, alleged abuse and misconduct by the arresting officers. Impeachment through silence is generally permitted where the witness had an opportunity to make a statement and would have been expected to do so under the circumstances. Under Doyle v. Ohio, 326 U.S. 610 (1976), however, the State may not impeach a criminal defendant for exercising her constitutional right to remain silent after receiving Miranda warnings. Because defendant's failure to make claims of abuse to the police department may have been induced by Miranda warnings she received upon her arrest, impeachment was improper.

Similarly, defendant's failure to report the abuse to a governmental agency before trial was inadmissible if it would have been reasonable for the defendant to believe that such a report could be used against her in court. Furthermore, because a defendant does not waive her right to silence by testifying at a pretrial hearing, defendant could not be impeached with her failure to raise the claimed abuse during her testimony at the hearing on the motion to quash.

The court noted, however, that if the defendant chooses to testify at trial, and the trial judge finds that it would have been natural to mention the alleged abuse during the testimony at the pretrial hearing, defendant's trial testimony may be impeached with her pretrial testimony.

The court also stressed that Doyle is limited to situations in which the silence of the defendant is induced by governmental action. Thus, on retrial the defendant may be impeached with her failure to relate her claim of abuse to the media, if the trial court finds that under the circumstances it would have been natural for her to do so.

People v. Powell, 301 Ill.App.3d 272, 703 N.E.2d 934 (4th Dist. 1998) In civil cases, "the law has long recognized that a party's silence when confronted with a statement made in his presence under circumstances that would normally call for a denial constitutes an admission." Although the "admission by silence" doctrine applies "under certain circumstances in criminal cases," its application is restricted. "[S]uch evidence should be received with caution and only when the conditions upon which it becomes admissible are clearly shown to exist."

The Seventh Circuit has made "a strong case" for the argument that the Constitution prohibits application of the "tacit admission" rule to the questioning of criminal suspects by police officers. (See **U.S. ex rel. Savory v. Lane**, 832 F.2d 1011 (7th Cir. 1987)). However, the court declined "to go that far," holding that it is "possible - even if highly unlikely - that a scenario could arise in which a defendant's tacit admission might be probative."

Where the prosecution seeks to introduce an admission by silence it must establish, under the totality of the circumstances, that defendant heard the statement in question, understood it, had the opportunity to deny it, and failed to do so. The trial court must also determine that it is more likely than not that an innocent person would have denied the statement if he believed it to be untrue.

The trial court erred by admitting the defendant's refusal to answer police questioning whether he had committed crimes against his wife. Defendant's silence "was probative of nothing," as it "may have been motivated by nothing more than his prior experience or the advice of counsel." In addition, the trial judge failed to determine that under the circumstances, a innocent person would have been likely to deny the truth of the deputy's questions.

People v. Hoffstetter, 203 Ill.App.3d 755, 560 N.E.2d 1349 (5th Dist. 1990) A conversation in which a codefendant asked defendant "to get rid of Tina" (an occurrence witness) who the codefendant was "worried about," and in which defendant replied that he "wasn't worried about Tina," was not an implied admission by the defendant. Since the conversation did not indicate or even mention any details of the crimes on trial, it was "too vague to be considered an admission of defendant's guilt."

People v. Mims, 204 Ill.App.3d 87, 561 N.E.2d 1101 (1st Dist. 1990) A document offered as a statement of a defendant may be reliable and admissible even in the absence of the defendant's signature. However, a proper foundation - testimony that the document accurately reproduces the actual questions asked and the answers given - must be given.

Here, the foundation requirement was "uncertain" because the State's Attorney who prepared the statement from his notes admitted that he paraphrased what defendant said. In addition, it was error to allow the document to go to the jury room; "[o]ur caution stems from concern over the undue weight that jurors may accord the written word, especially when they must rely on their memories alone when considering oral testimony." The Court also said:

> "We question the probative value of an unsigned, incriminating statement, even when an attempt is made to establish a proper foundation for its reliability. A defendant may fail or refuse to sign such a document for a number of reasons, but surely one of them is that he does not agree that it accurately reflects what he has said. This danger is greatly reduced when his signature appears on the statement."

People v. Cihak, 169 Ill.App.3d 606, 523 N.E.2d 975 (1st Dist. 1988) To qualify as an admission by silence, it is essential that the accused heard the incriminating statement, that the statement was made under circumstances which allowed an opportunity for the accused to reply, and that a person similarly situated would ordinarily have denied the accusation. See also, People v. Spivey, 58 Ill.App.3d 677, 374 N.E.2d 1068 (1st Dist. 1978) (the mere presence of the defendant when an out-of-court statement is made does not constitute an exception to the hearsay rule).

People v. Davis, 166 Ill.App.3d 1016, 520 N.E.2d 1220 (4th Dist. 1988) A written statement prepared by the police and signed by the defendant was admissible though defendant claimed he did not read it. Police officers testified that defendant did appear to read the statement.

People v. McDowell, 121 Ill.App.3d 491, 459 N.E.2d 1018 (1st Dist. 1984) Defendant's claim to have been in school at a relevant time, which was rebutted by attendance records, was an admission. Defendant's assertion, "when considered with other proof which showed it was erroneous, indicated a consciousness of guilt."

People v. Smith, 122 Ill.App.3d 609, 461 N.E.2d 534 (3d Dist. 1984) Admissions by silence were properly admitted; defendant was present and failed to respond when his mother said he could not pass a lineup and his wife acknowledged defendant's guilt.

People v. Harman, 125 Ill.App.3d 338, 465 N.E.2d 1009 (2d Dist. 1984) Defendant was properly prohibited from introducing evidence that he made an exculpatory statement to the police after his arrest. The State did not "open the door" to its introduction when a State witness made a single reference to defendant's statement to the police.

People v. Miller, 128 Ill.App.3d 574, 582 N.E.2d 83 (2d Dist. 1984) At defendant's trial for syndicated gambling, an undercover agent testified that defendant's father introduced defendant by saying, "This is my daughter, the one you call your bets into." The Appellate Court found that there was sufficient evidence for the jury to conclude that defendant heard the statement and that it was the type of statement that "would normally be denied or objected to by one who was innocent of any wrongdoing." However, "there is nothing in the record here to indicate whether defendant remained silent or denied the accusation." The absence of such proof by the State makes the statement inadmissible as an implied admission — it is not the defendant's responsibility to prove she denied the accusation.

People v. Guiterrez, 105 Ill.App.3d 1059, 433 N.E.2d 361 (2d Dist. 1982) "False exculpatory statements" by the defendant are probative as evidence of consciousness of guilt.

People v. Burns, 99 Ill.App.3d 42, 424 N.E.2d 1298 (1st Dist. 1981) An admission by the defendant is admissible as substantive evidence of guilt. An admission is any statement or conduct by the defendant which, when considered with other facts in evidence, permits an inference of guilt.

§19-12
Co-Conspirator Statements

United States Supreme Court
U.S. v. Inaldi, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986) Evidence of a nontestifying co-conspirator's out-of-court statement, which comes within the co-conspirator exception to the hearsay rule, may be introduced without a showing that the declarant is unavailable to testify.

Illinois Supreme Court
People v. Kliner, 185 Ill.2d 81, 705 N.E.2d 850 (1998) Under the co-conspirator exception, a declaration by one conspirator is admissible against all parties to the conspiracy, provided that the declaration was made during the pendency of the conspiracy and in furtherance of it. The co-conspirator's exception does not extend to statements which are merely narratives of past occurrences, however, or to statements that do not further any objectives of the conspiracy.

Statements relating to attempts to conceal a conspiracy are admissible under the co-conspirator's exception, because they further the conspiracy's objectives by helping the conspirators avoid punishment. In addition, efforts at concealment that are "sufficiently proximate in time" are considered to have occurred during the course of the conspiracy even if they occurred after the offense.

People v. Parmly, 117 Ill.2d 386, 512 N.E.2d 1213 (1987) Even if the co-conspirator exception includes statements made in furtherance of concealment or a cover-up of a crime, the statements in question here were not made in furtherance of concealment. The obvious motive of the declarant in stating that defendant fired a second shot was not to conceal the crime, "but to ensure that primary blame for the crime fell on the defendant." See also, People v. Byron, 164 Ill.2d 279, 647 N.E.2d 946 (1995) (statements were in furtherance of a conspiracy to both kill the decedent and obtain money from her heirs; statements made after the murder were "coolly calculated" to further the financial interests of the conspiracy and "inextricably intertwined" with the attempt to obtain money).

People v. Goodman, 81 Ill.2d 278, 408 N.E.2d 215 (1980) The statements of a co-conspirator are admissible against another co-conspirator, as an exception to the hearsay rule. For such a statement to be admissible: (1) the prosecution must make a *prima facie* showing that two or more persons, including the defendant, were engaged in a common plan to accomplish a criminal goal or to reach another end by criminal means, (2) the *prima facie* showing of conspiracy must be made by evidence independent of the statement being offered into evidence, and (3) the statement must have been made in furtherance of the conspiracy.

People v. Hairston, 46 Ill.2d 348, 263 N.E.2d 840 (1970) Statement made by an alleged co-conspirator at the time of his arrest was not a statement in furtherance of the conspiracy.

Illinois Appellate Court

People v. Jaimes, 2019 IL App (1st) 142736 Illinois Rule of Evidence 801(d)(2)(E) provides that when offered against a party, a statement made by a coconspirator "during the course and in furtherance of the conspiracy" is not hearsay. While statements which merely describe past events do not fit within this category, statements made as part of an ongoing conspiracy do. Here, the court admitted coconspirator statements which included descriptions of the shooting and subsequent flight from the scene, a statement that the group had started a gang war, and a statement that defendant told a coconspirator that he was the shooter. Because there was evidence of an ongoing conspiracy, specifically a gang conflict, and because the statements had the effect of advising other gang members about the status of that conspiracy and encouraging future acts of violence against the rival gang, the trial court did not abuse its discretion in admitting them.

People v. Denson, 2013 IL App (2d) 110652 Under the Illinois Rules of Evidence, a statement is not hearsay if it is offered against a party and was made by the party's co-conspirator during the course and in furtherance of the conspiracy. Ill. R. Evid. 801(d)(2)(E). Thus co-conspirator's statements should no longer be characterized as an exception to the rule against hearsay. Statements made in furtherance of a conspiracy include those that have the effect of advising, encouraging, aiding or abetting its perpetration. Statements made after the crime in an effort to conceal the crime or escape punishment further the objective of the conspiracy. A mere narrative of past occurrences that does not further any objective of the conspiracy is not admissible as a co-conspirator's statement.

Statements made by co-conspirators to an armed robbery that led to a murder were not mere restatements of what had occurred. The co-conspirators had called the witness to drive them to an apartment of one of the co-conspirators immediately after the murder had occurred because defendant "had to get on the highway." The co-conspirators still had the weapons in their possession and changed their destination because of the appearance of the police near the apartment. Explaining what happened and what led to their current

predicament furthered the efforts to conceal their actions. Because the statements were made in an effort to conceal the crime and escape punishment, they were properly admitted as co-conspirators' statements.

A co-conspirator's statement that she was glad that she was unable to contact a person because she did not want to set him up for a robbery by the co-conspirators was not admissible as a statement by a co-conspirator. The fact that the statement was made to a non-conspirator did not alone make the statement inadmissible. But the statement was not made in furtherance of the conspiracy because it was a mere narrative of what the co-conspirator had done and what the plans were for later than evening.

People v. Hoffstetter, 203 Ill.App.3d 755, 560 N.E.2d 1349 (5th Dist. 1990) A conspiracy includes "subsequent efforts at a concealment but only if the efforts are proximate in time to commission of the principal offense." A conversation which occurred six months after the crimes were committed was not proximate in time and did not occur during the conspiracy.

People v. Eddington, 129 Ill.App.3d 745, 473 N.E.2d 103 (4th Dist. 1984) For statements to be admissible under the co-conspirator exception to the hearsay rule, there must be a foundation consisting of independent proof of the conspiracy. In addition, the statements must be made during the pendency of the conspiracy. Here, there was no independent proof of the conspiracy and the statements were made more than three months after the murder and the declarant's arrest. See also, **People v. Deatherage**, 122 Ill.App.3d 620, 461 N.E.2d 631 (3d Dist. 1984) (testimony concerning certain statements of the co-defendant were improperly admitted under the co-conspirator exception where there was no evidence independent of the hearsay to establish a conspiracy; **People v. Duckworth**, 180 Ill.App.3d 792, 536 N.E.2d 469 (4th Dist. 1989) (co-defendant's statements were not admissible under the co-conspirator's exception where the sole evidence of a conspiracy, other than the statements, consisted of defendant's appearance at the mall where the drug sale was to occur).

People v. Miller, 128 Ill.App.3d 574, 582 N.E.2d 83 (2d Dist. 1984) At a trial for syndicated gambling, a statement by defendant's father introducing defendant as his daughter and stating that she was "the one you call your bets into" was properly introduced under the co-conspirator exception. The evidence established a *prima facie* case of conspiracy between defendant and her father, and the statement was made in furtherance of the conspiracy.

People v. Link, 100 Ill.App.3d 1000, 427 N.E.2d 589 (2d Dist. 1981) A conspiracy includes subsequent efforts at concealment. Thus, a co-conspirator's statement made within two days of the crime and directed at concealing his involvement was admissible under the co-conspirator exception.

People v. Meagher, 70 Ill.App.3d 597, 388 N.E.2d 801 (3d Dist. 1979) It is not necessary for the admission of co-conspirator statements that all the conspirators be charged or tried, as long as a *prima facie* case of conspiracy is shown.

People v. Kiel, 75 Ill.App.3d 1030, 394 N.E.2d 883 (3d Dist. 1979) It is within the trial court's discretion to receive evidence of a co-conspirator's statements before sufficient proof of the conspiracy has been given. Trial judge did not err here by admitting the statement where the State subsequently proved a *prima facie* case of conspiracy.

People v. Jackson, 49 Ill.App.3d 1018, 364 N.E.2d 975 (2d Dist. 1977) To be admissible under the co-conspirator exception, a statement need not be made in the presence of the defendant.

§19-13
Dying Declarations

Illinois Supreme Court
People v. House, 141 Ill.2d 323, 566 N.E.2d 259 (1990) The murder victim was set on fire and sustained severe burns over 40% of her body. She survived for about a month after the incident.

About 2½ hours after the incident, while undergoing treatment at the hospital, the victim gave a description of her attackers. The Supreme Court held that this statement was not admissible as a dying declaration because there was no showing that the declarant had been told she was going to die or believed she was going to die.

People v. Scott, 52 Ill.2d 432, 288 N.E.2d 478 (1972) A necessary condition for the admission of a dying declaration is a showing that the declaration was intelligently made and understood by the person who witnessed it.

People v. Odum, 27 Ill.2d 237, 188 N.E.2d 720 (1963) Dying declarations are statements by the victim concerning the cause and circumstances of a homicide. To be admissible, such statements must be made while the decedent is under the fixed belief and moral conviction that death is impending and certain to follow almost immediately, without opportunity for repentance, and in the absence of all hope of avoidance, at a time when he has despaired of life and looks to death as inevitable and at hand.

People v. Tilley, 406 Ill. 398, 94 N.E.2d 328 (1950) For a "dying declaration" to be admissible, it must appear that the declarant was sufficiently in possession of his mental faculties to understand what he was doing and able to give a true and correct account of the facts to which the statement relates.

Illinois Appellate Court
People v. Harris, 2020 IL App (5th) 160454 Murder victim's statement identifying defendant as the person who shot him was properly admitted as a dying declaration under Illinois Rule of Evidence 804(b)(2). The victim had sustained multiple gunshot wounds, told the officer he was going to die, and gave a coherent statement to the responding officer before medical assistance arrived. The court also concluded that admission of the statement did not violate defendant's sixth amendment right to confrontation, relying on **People v. Gilmore**, 356 Ill. App. 3d 1023 (2d Dist. 2005), and **People v. Graham**, 392 Ill. App. 3d 1001 (1st Dist. 2009).

People v. Perkins, 2018 IL App (1st) 133981 The trial court abused its discretion in admitting as dying declarations two statements of identification, made by the victim of a gunshot wound to the face. To admit a statement as a dying declaration, the proponent must show: (1) the statement relates to the underlying homicide; (2) the declarant believes death is almost certainly imminent; and (3) the declarant is mentally capable of giving an accurate statement. Here, the trial court made no findings as to the declarant's belief that death was

imminent, and nothing in the record established that she did. Despite the seriousness of the injury, the declarant never stated that she believed death was imminent, and nobody told the declarant that her death was imminent.

The trial court did not, however, abuse its discretion in finding the statements to be excited utterances even though they were made one to two hours after the shooting. The declarant made the statements during treatment in the ER, and while a bullet was still lodged in her head. Under these circumstances, it is unlikely that the declarant spent the time between the incident and the statement fabricating a story, and the lapse of time did not diminish the excitement of the event.

These excited utterances were testimonial, as they were made to police officers and, with defendant already under arrest, were not elicited to address an ongoing emergency. But defendant forfeited his confrontation rights with regard to this witness. Under the forfeiture-by-wrongdoing doctrine, testimonial statements are admissible if the State proves by a preponderance of the evidence that defendant killed the declarant with the intent to prevent her from testifying. Here, the State alleged that defendant shot the declarant to keep her from testifying against him either for a violation of an order of protection or for a pending criminal damage to property case. Defendant argued that the doctrine applies only to a killing aimed at procuring the witness's testimony for the trial at which they are admitted. In **People v. Peterson**, 2017 IL 120331, the Illinois Supreme Court held that the doctrine applies to killings aimed at preventing *any* testimony, not just potential testimony at the murder trial stemming from the killing. The Appellate Court applied **Peterson** in this case and found the trial court properly found the doctrine applicable where defendant acted with intent to prevent the declarant from testifying in other matters.

People v. Jenkins, 2013 IL App (4th) 120628 The hearsay exception for dying declarations applies where: (1) at the time a hearsay statement was made the declarant believed that his or her death was imminent, and (2) the statement related to the cause or circumstances of what the declarant believed to be the impending death. The trial court did not act against the manifest weight of the evidence where it concluded that because there was no evidence the declarant believed his death to be imminent, a statement made in the hospital after the declarant came out of surgery for a gunshot wound did not qualify for the dying declaration. The court noted that no one asked the declarant whether he thought he was dying, and he never communicated a belief that his death was impending. Although the declarant might not have believed that his survival was assured, where he had lived through surgery and was still being treated the record did not contradict the trial court's conclusion that the declarant did not believe his death to be imminent.

People v. Stiff & Ragusa, 904 Ill.App.3d 1174, 328 N.E.2d 664 (5th Dist. 2009) The dying declaration exception to the hearsay rule consists of the following elements: (1) the declaration pertains to the cause or circumstances of the death, (2) the declarant possesses sufficient mental faculties to give an accurate statement about the circumstances of his or her death, and (3) the declarant believes that death is imminent. The party seeking to admit a dying declaration must show that when the statement was made, the declarant possessed a fixed belief and moral conviction that certain death was impending.

Statements which an arson victim made to a friend just after the offense and to police officers two days later did not qualify as dying declarations. Although the victim had all of his mental faculties and the statements pertained to the circumstances which led to his death, there was no evidence that he believed his death was imminent. The court acknowledged that police officers, medical personnel, and at least some of the declarant's

friends believed that he was certain to die; however, there was no evidence that the declarant had the same belief. See also, **People v. Montague**, 149 Ill.App.3d 332, 500 N.E.2d 592 (4th Dist. 1986) (statement was improperly admitted as a dying declaration where there was no indication that the victim believed that death was impending; victim was trying to leave the scene when police arrived and had to be told to settle down, and neither the police nor the victim made any mention of death).

People v. Gilmore, 356 Ill.App.3d 1023, 828 N.E.2d 293 (2d Dist. 2005) Relying on dicta in **Crawford v. Washington**, 541 U.S. 36 (2004), the Appellate Court held that **Crawford** does not apply to statements which qualify for the "dying declaration" exception to the hearsay rule. The court found that the U.S. Supreme Court's dicta in Crawford was "a strong indication that the Court does not believe that admitting testimonial dying declarations violates the confrontation clause." See also, **People v. Ingram**, 382 Ill.App.3d 997, 888 N.E.2d 520 (1st Dist. 2008) (admission of statements which qualify for the dying declaration exception to the hearsay rule does not violate Crawford v. Washington, even where there was no opportunity for cross-examination, because such statements are not "testimonial" and because **Crawford** states that even "testimonial" dying declarations are admissible).

People v. Lawson, 232 Ill.App.3d 284, 596 N.E.2d 1235 (4th Dist. 1992) The requirements of the dying declaration exception were satisfied in this case. The decedent had been shot nine times and was bleeding to death, and when discovered was conscious, coherent and crying out for help. Before naming defendant as the person who "did this," the decedent repeatedly stated he had been shot in the back and was dying. Decedent's insistence on being removed from the ravine did not necessarily indicate a lack of belief that death was imminent; almost anyone who believes he is dying will cling nonetheless to even a slim hope of recovery. Furthermore, because the statement was made while decedent was in a ravine bleeding from nine bullet wounds, the lack of specificity in the claim that defendant was "responsible" did not justify finding that defendant's responsibility might have involved something other than firing the fatal shots. See also, **People v. Newell**, 135 Ill.App.3d 417, 481 N.E.2d 1238 (1st Dist. 1985) (for statement to be admitted as a dying declaration, the declarant must have truly believed he was dying and that his death was imminent; however, "to require that the declarant should have lost every scintilla of a hope of recovery would be to require the impossible").

People v. Cobb, 186 Ill.App.3d 898, 542 N.E.2d 1171 (2d Dist. 1989) A statement made by the victim shortly after she was stabbed and shortly before she died was properly admitted as a dying declaration. The fact that the victim had a very high blood-alcohol content when she died did not show that she lacked sufficient mental faculties to comprehend what she was doing and give an accurate account of what had happened.

Furthermore, the victim's statement ("He killed me") was not too indefinite to be admitted where the defendant was the only male in the vicinity.

People v. Montague, 149 Ill.App.3d 332, 500 N.E.2d 592 (4th Dist. 1986) A police officer was allowed to testify that while at the crime scene awaiting an ambulance, the victim named the person who had shot him. The officer also testified that he told the victim he was "seriously injured," but the victim was never told or expressed any knowledge that he was dying.

The Appellate Court held that the above statement was improperly admitted as a dying declaration because there was no indication that the victim believed death was impending. The victim was trying to leave the scene when police arrived and had to be told to settle down, and neither the police nor the victim made any mention of death.

People v. Webb, 125 Ill.App.3d 924, 466 N.E.2d 936 (1st Dist. 1984) Shooting victim's identification of defendant's photograph was properly admitted as a dying declaration.

§19-14
Spontaneous Declarations; Corroborative Complaints; Statements Under 725 ILCS 5/115-10

§19-14(a)
Spontaneous Declarations (Excited Utterances)

Illinois Supreme Court
People v. Sutton, 233 Ill.2d 89, 908 N.E.2d 50 (2009) The "spontaneous declaration" exception permits the admission of a hearsay statement where: (1) there is an occurrence that is sufficiently startling to produce a spontaneous and unreflecting statement, (2) there is no time for the declarant to fabricate a statement, and (3) the statement relates to the circumstances of the occurrence. The "totality of the circumstances" test is used to determine whether a hearsay statement is admissible under the "spontaneous declaration" exception. Several factors are considered, including the passage of time, the mental and physical condition of the declarant, the nature of the startling event, and the presence or absence of self-interest. The period of time which may pass without affecting the spontaneity of the statement varies from case to case; the critical question is whether the statement was made while the excitement of the startling event "predominated."

Statements to police officers at the scene of the crime and in an ambulance while being taken to the hospital clearly qualified for the "spontaneous declaration" exception. Police officers arrived on the scene in response to calls that a man was pounding on doors and ringing doorbells, and found the declarant staggering and bleeding from the head. He told officers that he had been shot and robbed and that his girlfriend had been shot. The statement in the ambulance was made about 20 minutes later, as the declarant was being treated for his wounds and receiving oxygen. Under these circumstances, it was unreasonable to believe that the witness spent the time between the event and the statements fabricating the statements. See also, **People v. Stiff & Ragusa**, 391 Ill.App.3d 494, 904 N.E.2d 1174 (5th Dist. 2009) (where the victim was doused with gasoline and set on fire and the defendant's statements related to the circumstances of the occurrence, the first two requirements of the spontaneous declaration exception were satisfied; although the record was silent as to the exact amount of time which passed between the startling event and the victim's statements, in view of his injuries the victim's full attention would have been focused on obtaining medical help rather than on fabricating a statement; in addition, the lapse of time was likely insignificant where the victim traveled only 295 feet to get help and the injuries appeared to have been recently inflicted; statements were admissible).

People v. Robinson, 217 Ill.2d 430, 838 N.E.2d 930 (2005) To qualify as a spontaneous declaration, the following three factors are required: (1) an occurrence sufficiently startling to produce a spontaneous, unreflecting statement, (2) the absence of time to fabricate, and (3) a statement that relates to the circumstances of the startling occurrence.

People v. Williams, 193 Ill.2d 306, 739 N.E.2d 455 (2000) A statement may be admitted as a spontaneous declaration where: (1) there is an occurrence sufficiently startling to produce a spontaneous and unreflecting statement, (2) there is an absence of time for the declarant to fabricate, and (3) the statement relates to the circumstances of the startling event. In determining whether the spontaneous declaration exception applies, courts consider the totality of the circumstances, including the time elapsed between the event and the statement, the nature of the startling event, the mental and physical condition of the declarant, and the presence or absence of any self-interest.

The fact that a statement is volunteered may indicate admissibility under the spontaneous declaration exception, although the mere fact that the statement was in response to questioning does not necessarily destroy spontaneity. In determining whether the spontaneous declaration exception applies, it is more important whether the statement was made under the influence of the startling event than whether a particular amount of time passed between the event and the statement.

Statements which a seven-year-old made between six and eleven hours after witnessing two murders were properly admitted as spontaneous declarations. Where child declarants are involved, similar delays have not precluded application of the spontaneous declaration exception. In addition, the child fell into a "fitful" sleep during which he cried out and from which he awakened crying, refused an offer of food, and spoke in a "frantic voice" while appearing to be scared. Such evidence established that the child was still under the effect of the startling events at the time of the statements.

The court rejected the argument that because witnesses described the child as "worried," a substantial period of reflection must have occurred. The court found that the child was fearful and anxious, and that his "very simplified" recounting of the events established that the statements were made without reflection.

People v. Zwart, 151 Ill.2d 37, 600 N.E.2d 1169 (1992) The Supreme Court rejected the State's argument that statements made five weeks after an incident of alleged sexual abuse could be admitted as "spontaneous declarations." Even if the trial court's factual findings were rejected and it was assumed that the statements occurred within five days of the abuse, the required spontaneity was absent where the victim had been interviewed at least three times before she first claimed to have been abused. See also, People v. Kinnett, 287 Ill.App.3d 709, 679 N.E.2d 481 (2d Dist. 1997) (statements made five and eight weeks after alleged incident were not spontaneous); People v. Victors, 353 Ill.App.3d 801, 819 N.E.2d 311 (2d Dist. 2004) (statements were not spontaneous where the declarant had been questioned for approximately five minutes by a backup officer before making the statements in question).

People v. Lawler, 142 Ill.2d 548, 568 N.E.2d 895 (1991) Statements which an abducted woman made in a telephone conversation to her father were not admissible as spontaneous declarations where the complainant admitted fabricating much of the conversation so that her father would become suspicious and question her. The complainant "obviously had enough time to reflect on the situation, conceive a fabrication, and execute that fabrication in making her phone call." In addition, the complainant's statements were made in response to a "series of leading questions" by the father. See also, **People v. Patterson**, 154 Ill.2d 414, 610 N.E.2d 16 (1992) (writings which defendant made while left alone in a police interview room for one hour were not spontaneous, as defendant clearly had time to reflect.)

People v. House, 141 Ill.2d 323, 566 N.E.2d 259 (1990) "Time is one factor, albeit an elusive one, whose significance will vary with the facts of each case." Other factors that are considered include "the nature of the event, the mental and physical condition of the declarant, and the presence or absence of self-interest."

People v. House, 141 Ill.2d 323, 566 N.E.2d 259 (1990) A 2½ hour delay did not render physical descriptions by victim of crime inadmissible as spontaneous declaration; given the nature of events, the declarant's physical condition, and the absence of any motive to fabricate, the statements were sufficiently spontaneous to be admitted where the victim had not only seen her sister and another woman killed, but had herself been set on fire and suffered such serious burns that "deep facial tissue was exposed and her clothing and skin had to be "cut" away to permit treatment. The Court found it "inconceivable" that the victim had spent the time between the incident and her statements reflecting on the experience or fabricating a story to tell police.

The Court rejected the contention that a declarant cannot make a spontaneous declaration to a person after having spoken previously to another. "No such per se rule exists. . . . The fact that the declarant may have previously spoken to another is merely a factor to consider in determining admissibility."

People v. Gacho, 122 Ill.2d 221, 522 N.E.2d 1146 (1988) Where a shooting victim had been locked in a car trunk for 6½ hours, the spontaneity of his statement was not destroyed by officer's question, "[W]ho did this to you?" The time factor in regard to spontaneous declarations "is an elusive element and will vary with the facts of the case." Here, the response was the declarant's "first opportunity to speak with anyone" after a period of confinement, in a seriously wounded condition, with a corpse. "We believe it is inconceivable . . . that [the declarant] would have spent the time under these conditions to attempt to fabricate a story or statement about the event." See also, **People v. Nevitt**, 135 Ill.2d 423, 553 N.E.2d 368 (1990) (five-hour-delay and question "what's wrong" did not destroy spontaneity of statement by three-year-old to his mother; circumstances show that the statement was reliable and the product of the event rather than deliberation); **People ex rel. Hatch v. Elrod**, 190 Ill.App.3d 1004, 547 N.E.2d 1264 (1st Dist. 1989) (statement by shooting victim after being locked in car trunk and made while being wheeled into emergency room).

People v. Shum, 117 Ill.2d 317, 512 N.E.2d 1183 (1987) The commission of a crime, particularly a sex offense or one involving force or violence, constitutes a "startling occurrence." See also, **People v. House**, 141 Ill.2d 323, 566 N.E.2d 259 (1990) (declarant saw two murders and was set on fire); **People v. Nevitt**, 135 Ill.2d 423, 553 N.E.2d 368 (1990) (sex offense); **People v. Fields**, 71 Ill.App.3d 888, 390 N.E.2d 369 (1st Dist. 1979) (armed robbery).

People v. Leonard, 83 Ill.2d 411, 415 N.E.2d 358 (1980) The decedent's statement ("He's got a gun") was properly admitted as a spontaneous declaration. The statement was corroborated by several witnesses who saw the nearly contemporaneous struggle over the gun between defendant and the decedent; thus, the circumstantial evidence was sufficient to corroborate the existence of an occurrence sufficiently startling to produce a spontaneous and unreflecting statement. See also, **People v. Nevitt**, 135 Ill.2d 423, 553 N.E.2d 368 (1990)

(there was "ample circumstantial evidence demonstrating the meaning of the child's declaration ['teacher Tony bit my ding dong'] in relation to the occurrence").

People v. Robinson, 73 Ill.2d 192, 383 N.E.2d 164 (1978) In regard to the "absence of time to fabricate" requirement, the "pertinent point is whether there was a lack of sufficient time to allow an opportunity for reflection and invention." See also**, People v. Shum**, 117 Ill.2d 317, 512 N.E.2d 1183 (1987) ("the time factor is an elusive element and will vary with the facts of the case").

People v. Robinson, 73 Ill.2d 192, 383 N.E.2d 164 (1978) The Supreme Court discussed the distinctions between a "spontaneous declaration" and a "corroborative complaint" in a sex offense case, and held that the complainant"s statement to a police officer, after she had discussed the incident with two other people, did not come within the spontaneous declaration exception. However, the statement was admissible as a "corroborative complaint."

People v. Taylor, 48 Ill.2d 91, 268 N.E.2d 865 (1971) Testimony about complaint of rape victim was not admissible as either a spontaneous declaration or a corroborative complaint. The complaint was made in response to questions, and "had the questions not been asked the statement would not have been made."

Illinois Appellate Court

People v. Fox, 2022 IL App (4th) 210262 No plain error occurred when the State elicited two hearsay statements made by either defendant or a co-defendant. First, a witness testified that in the aftermath of a shooting, defendant and co-defendant were gathered around a police scanner. When the name of a potential eyewitness to the shooting came over the scanner, one of the men stated "there was no way she would have seen." Second, a witness testified that when the police pulled up to the house, defendant or co-defendant shouted "they got us."

Although the admission of a hearsay statement made by a non-testifying co-defendant would be unconstitutional, no error occurred in this case. First, the statements did not implicate the confrontation clause because they were non-testimonial. In any event, the evidence was not closely balanced for purposes of the first prong of the plain error rule, and courts have found that confrontation clause violations do not arise to the type of structural errors reviewable under the second prong. See **People v. Patterson**, 217 Ill. 2d 407 (2005). Finally, the statements were admissible as excited utterances, regardless of the declarant.

People v. Sapp, 2022 IL App (1st) 200436 Defendant was engaged in a scuffle in a restaurant when a gun fell to the floor. Defendant was charged with illegally possessing the gun.

At defendant's trial, an employee of the restaurant testified that he believed the gun fell from defendant's person. Defendant was at the restaurant with Jocelyn Mrozak, and the State introduced a receipt showing that Mrozak had purchased the gun found in the restaurant. Defendant sought to introduce a statement by Mrozak to an employee, in which she claimed ownership of the gun as defendant was escorted outside. The trial found the out-of-court statement inadmissible hearsay.

The defense called Mrozak to the stand. But, because Mrozak had been charged with filing false police reports in which she alleged the gun was stolen, the trial court advised her

to discuss her fifth amendment rights with an attorney prior to taking the stand. Mrozak decided to plead the fifth. Defendant was convicted of all three charges.

On appeal, defendant alleged that the trial court interfered with his right to present a defense when it advised Mrozak to discuss her testimony with an attorney, resulting in her decision to plead the fifth. The fundamental right to present evidence is violated if the State or the court exerts improper influence on defense witnesses causing them not to testify. Courts must walk a fine line between, on the one hand, fully advising the witness of the danger of self-incrimination and the right not to testify, and, on the other hand, threatening the witness to an extent which materially impairs the defendant's due process right to present witnesses in his defense.

Here, the trial court did not err with respect to Mrozek's invocation of her fifth amendment privilege. The court correctly concluded that Mrozek could reasonably fear prosecution based on her involvement with the false police reports. Advising her to discuss the matter with the attorney was a reasonable step that did not involve coercion.

Nor did the court err in barring Mrozek's out-of-court statement. While defendant argued the excited utterance exception applied, he failed to proffer sufficient evidence to show Mrozek even saw the gun, which was inside the restaurant. The record was too sparse to determine whether Mrozek witnessed an event sufficiently startling so as to produce a spontaneous and unreflecting statement, or that she lacked time to fabricate the statement.

People v. Morales, 2021 IL App (2d) 190408 The complainant's statement to a 911 operator that defendant had choked her, was properly admitted as an excited utterance even if the statement was prompted by the operator's questions. A statement meets the excited utterance/spontaneous declaration exception to the hearsay rule when it is made "while the excitement of the event predominated." Here, the complainant called 911, was out of breath, and repeatedly shouted that she needed help before answering the operator's question with the statement at issue. Under these circumstances, the court did not abuse its discretion in admitting the statement.

People v. Feliciano, 2020 IL App (1st) 171142 Injured individual's statements to paramedics, police officer, and emergency room doctor identifying defendant as the person who had hurt him were not testimonial when the factors identified in **Davis v. Washington**, 547 U.S. 813 (2006) were considered. Specifically, the Appellate Court found that the victim was facing an ongoing emergency because he was receiving medical treatment at the time, the statements were necessary to resolve the ongoing emergency because emergency personnel needed to treat him and determine whether the perpetrator was still present at the scene, and the statements were made frantically where the victim was upset and angry when he spoke.

Further, those non-testimonial statements were admissible as spontaneous declarations even though the victim may have been injured as much as two days prior to making the statements. The elderly victim was discovered trapped under a dresser in his bedroom and had last been seen by a neighbor two days prior. He immediately named defendant as the individual who hurt him when he was discovered by his neighbor, and he repeated that identification to emergency personnel. The Appellate Court concluded that the excitement of the event predominated, despite the passage of time.

People v. Busch, 2020 IL App (2d) 180229 The trial court erred when it admitted several hearsay statements made by the victim in defendant's prosecution for domestic battery. Before trial, the State attempted to serve the victim a subpoena, but she was difficult to find

due to homelessness and the State was unable to procure her presence in court. The State successfully moved to admit her prior statements pursuant to 725 ILCS 5/115-10.2a, and defendant was convicted.

The Appellate Court reversed. In order to be admitted under section 115-10.2a, the State must establish that: (1) the statement is not subject to any other hearsay exception, (2) the declarant is unavailable, and (3) the statement is accompanied by equivalent circumstantial guarantees of trustworthiness. Here, the victim was formally interviewed by a 16-year-old employee of a homeless shelter about injuries inflicted by defendant. The employee called 911, and the victim made additional statements to the 911 operator implicating defendant. She made similar statements to a resident of the shelter. Finally, police came and the victim provided a written statement implicating defendant.

Section 115-10.2a did not apply because the State failed to show that the declarant was unavailable. While it sought to serve process, the statute requires the State to use other reasonable means of obtaining the witness' presence. The State took no additional steps here. The State's argument that the 911 call could be admitted as an excited utterance instead lacked merit because the victim had already spoken to others prior to that call.

The admission of the statements was not harmless error where the State could not show beyond a reasonable doubt that defendant would have been convicted absent the statements. If on remand the State is able to show unavailability, the statements must still satisfy the confrontation clause. In that case, the Appellate Court opined that the statements to the shelter employee should be considered testimonial because she assumed a role as a law-enforcement representative by calling 911 and gathering information about the offense. The statements to the 911 operator and police were also testimonial. The statement to the resident was non-testimonial.

People v. Mayberry, 2020 IL App (1st) 181806 The excited utterance exception is not limited to statements made during an ongoing emergency. It applies whenever "the statement was made while the excitement of the event predominated." Here, the shooting victim's statement that it was "Lil Dave from the hood" who shot him was an excited utterance even though he had limped a couple of blocks from the scene to a neighbor's house and was waiting for an ambulance to arrive when he made the statement.

People v. Moffett, 2019 IL App (2d) 180964 Defendant was charged with aggravated battery based on an allegation that she bit a correctional officer. A recording of the incident in question showed correctional officers restraining defendant, at which time one officer said "ow!" another officer asked, "Did she bite you?," and the first officer responded "yes." The Appellate Court held that trial court erred in granting defendant's motion *in limine* to exclude the question and answer regarding whether defendant bit the officer.

Citing **People v. Georgakapolous**, 303 Ill. App. 3d 1001 (1999), the Court held that the statement confirming that defendant bit the officer was an excited utterance, even though it was made in response to a question from another officer. Questioning is a factor to consider in determining reliability of the statement, but it does not automatically negate its spontaneity.

And, because the statement was an excited utterance, it was substantively admissible even though it was also a prior consistent statement. Illinois Rule of Evidence 613(c) provides that prior consistent statements are not limited to rehabilitating a witness if the statement's substantive admission is otherwise authorized. While that provision was added to Rule 613 during the course of the appeal, the amended version applies because a ruling on a motion *in limine* is an interlocutory order subject to reconsideration at any time prior to or during trial.

People v. Denis, 2018 IL App (1st) 151892 The court erred in admitting complainant's outcry statement made 10 years after the alleged sexual assault. The State contended that because the outcry occurred during an argument with her mother, it was an excited utterance. But the court held that the statement must stem from excitement caused by the incident discussed in the statement. Here, the statement referred to a 10-year-old incident. Although that incident was traumatic, the excitement of those events no longer predominated when the complainant made her statement. Nor did the corroborative complaint exception apply, because that exception does not allow the witness to provide details of the complaint or the identity of the perpetrator.

Because neither of these hearsay exceptions applied, the outcry was an inadmissable prior consistent statement. The State did not elicit the statement to rebut a charge of recent fabrication; the State elicited the statement on direct examination. However, the error was not prejudicial where defendant confessed and the complainant credibly testified about the offense at trial.

People v. Perkins, 2018 IL App (1st) 133981 The trial court abused its discretion in admitting as dying declarations two statements of identification, made by the victim of a gunshot wound to the face. To admit a statement as a dying declaration, the proponent must show: (1) the statement relates to the underlying homicide; (2) the declarant believes death is almost certainly imminent; and (3) the declarant is mentally capable of giving an accurate statement. Here, the trial court made no findings as to the declarant's belief that death was imminent, and nothing in the record established that she did. Despite the seriousness of the injury, the declarant never stated that she believed death was imminent, and nobody told the declarant that her death was imminent.

The trial court did not, however, abuse its discretion in finding the statements to be excited utterances even though they were made one to two hours after the shooting. The declarant made the statements during treatment in the ER, and while a bullet was still lodged in her head. Under these circumstances, it is unlikely that the declarant spent the time between the incident and the statement fabricating a story, and the lapse of time did not diminish the excitement of the event.

These excited utterances were testimonial, as they were made to police officers and, with defendant already under arrest, were not elicited to address an ongoing emergency. But defendant forfeited his confrontation rights with regard to this witness. Under the forfeiture-by-wrongdoing doctrine, testimonial statements are admissible if the State proves by a preponderance of the evidence that defendant killed the declarant with the intent to prevent her from testifying. Here, the State alleged that defendant shot the declarant to keep her from testifying against him either for a violation of an order of protection or for a pending criminal damage to property case. Defendant argued that the doctrine applies only to a killing aimed at procuring the witness's testimony for the trial at which they are admitted. In **People v. Peterson**, 2017 IL 120331, the Illinois Supreme Court held that the doctrine applies to killings aimed at preventing *any* testimony, not just potential testimony at the murder trial stemming from the killing. The Appellate Court applied **Peterson** in this case and found the trial court properly found the doctrine applicable where defendant acted with intent to prevent the declarant from testifying in other matters.

People v. Axtell, 2017 IL App (2d) 150518 During a domestic dispute, defendant struck his girlfriend, Tammy Stone, with his hands three times over the course of a single evening. The second of those strikes resulted in Stone losing consciousness briefly and sustaining facial

bruising and swelling. The third blow, less than an hour later, resulted in her death. During the time between the second and third blows, Stone told her son, "We need to find the phone or [defendant] is going to kill me."

Defendant's statement to her son was properly admitted at trial as an excited utterance. While the statement explicitly referred to future conduct, it implicitly related to defendant's very recent past conduct. It was a "prediction" which tended to prove that defendant had just committed a violent act against her, and therefore related to the startling event preceding it.

People v. Abram, 2016 IL App (1st) 132785 At defendant's trial for possession of a controlled substance with intent to deliver, the trial court admitted an audio recording of hearsay statements made by a police officer during a chase of defendant's car. During the chase, defendant threw packages of cocaine out the window. The recording contained communications by a pursuing officer to headquarters and other officers, and described defendant's actions during the chase.

1. The court concluded that the hearsay statements on the tape were not admissible under the "present sense impression" hearsay exception. Although such an exception is recognized under the Federal Rules of Evidence, neither Illinois courts nor the Illinois Rules of Evidence recognize it.

2. However, the trial court did not abuse its discretion by finding that the hearsay statements qualified as excited utterances. A statement is admissible as an excited utterance where it relates to a startling event or condition and was made while the declarant was under the stress of excitement caused by the event or condition. The exception rests on the theory that an event may be so startling that it temporarily stills the capacity for reflection and produces statements that are free of conscious fabrication. Thus, what makes a statement presumptively trustworthy as an excited utterance is the presence of a sudden, startling event which deprives the declarant of an opportunity to reflect. In determining whether a statement qualifies as an excited utterance, courts consider the totality of the circumstances including the time elapsed between the event and the utterance, the nature of the event, the declarant's mental and physical condition, and the presence of self-interest.

Here, the statements clearly related to police efforts to apprehend defendant and were made contemporaneously with the events described. Thus, the critical question was whether the pursuit of a suspect by police is a sufficiently startling event to permit the officer's statements to be admitted as excited utterances.

Although the officer's voice was relatively calm throughout the recording and the officer testified that he was part of an operation which was routinely sent to high crime areas in the city to interdict violent crimes, the court noted that he also testified that at the time of the pursuit he did not know whether a second person was in defendant's car or whether defendant was armed. The court concluded that under these circumstances, it could not be said that the trial court erred by concluding that the statements qualified as excited utterances.

Defendant's conviction was affirmed.

People v. Connolly, 406 Ill.App.3d 1022, 942 N.E.2d 71 (3d Dist. 2011) 1. Statements are admissible under the excited-utterance exception to the hearsay rule where there is an occurrence sufficiently startling to produce a spontaneous and unreflecting statement, an absence of time for the declarant to fabricate the statement, and a statement relating to the circumstances of the occurrence. The critical inquiry with respect to time is whether the

statement was made while the declarant was still affected by the excitement of the event. That the statement was made in response to inquiry does not necessarily destroy spontaneity.

An act of domestic violence is sufficiently startling to render inoperative the normal reflective thought processes of a victim. Statements made within a few minutes of an act of domestic violence also do not allow time for reflection while the emotional upset resulting from the event continues. Therefore the trial court did not abuse its discretion in concluding that the totality of circumstances supported the conclusion that defendant's wife's statements were excited utterances, even though made in response to police questioning.

2. An out-of-court statement made to a law enforcement official is not testimonial when the circumstances objectively indicate that the primary purpose of any questioning was to address an ongoing emergency. Factors to be considering in deciding whether the interrogation was to meet an ongoing emergency are: (1) whether the purpose was to determine a past fact or ascertain an ongoing event; (2) whether the situation could be described as an emergency; (3) whether the nature of the questions focused on the present or on the past; and (4) the level of formality involved.

The statements by defendant's wife were not testimonial because the statements were made while the police addressed an ongoing emergency. Defendant's neighbor called the police when she observed defendant and his wife screaming and yelling at each other as defendant held their son. The police arrived on the scene five to seven minutes after the dispatch and spoke with defendant's wife who appeared nervous, upset, and agitated. Defendant's wife reported that defendant had battered her, had set their son in the street, and then had left with the son. The police questioned other witnesses to assess the ongoing situation, and then proceeded to locate defendant and the child, who was returned to the wife.

People v. Dobbey, 2011 IL App (1st) 091518 A hearsay statement is admissible under the excited utterance or spontaneous declaration exception where: (1) there is an occurrence sufficiently startling to produce a spontaneous and unreflecting statement; (2) there is an absence of time for the declarant to fabricate the statement; and (3) the statement relates to the circumstances of the occurrence.

A statement made by a shooting victim qualified for admission as an excited utterance or spontaneous declaration. The statement was made after the declarant was mortally wounded in a shooting while a passenger in a car. The driver was also injured. A backseat passenger drove the car to a gas station to call for help. This scenario was sufficiently startling to produce a spontaneous and unreflecting statement. Only a matter of minutes elapsed between the shooting and the statement, and the statement was made as the declarant was lying on the ground experiencing the physical effects of the shooting to his chest, before he had time to reflect on the event. As the statement identified the defendant as the shooter, the statement related to the circumstances of the shooting.

People v. Sullivan, 366 Ill.App.3d 770, 853 N.E.2d 754 (1st Dist. 2006) Declarant of spontaneous declaration may be eyewitness or bystander, and need not be the victim of the crime. See also, **People v. McNeal**, 88 Ill.App.3d 20, 410 N.E.2d 480 (4th Dist. 1980) (testimony about out-of-court statement may be introduced as a spontaneous declaration though the identity of the declarant is unknown).

People v. Meras, 284 Ill.App.3d 157, 671 N.E.2d 746 (1st Dist. 1996) To be an excited utterance, a statement must concern an occurrence or event sufficiently startling to cause a spontaneous and unreflecting statement. In addition, there must be an absence of time to

fabricate and a relationship between the statement and the circumstances of the occurrence. Each statement is to be judged on the totality of the circumstances; among the factors to be considered are the passage of time, the nature of the startling event, the mental and physical condition of the declarant, the distance the decedent traveled before making the declaration, the presence or absence of self-interest, any intervening circumstances and the nature and circumstances of the statement itself.

Spontaneity is not destroyed merely because the statement was made in response to a question; the central question is whether the declarant had time for "reflection and invention."

The totality of the circumstances established the requirements for admission as an excited utterance. The declarant had been severely beaten, and the statement identifying defendant was made only minutes after the beating and immediately after the decedent regained consciousness and while he was still lying in a pool of blood. Reliability was also enhanced because the declarant was unconscious until just before making the statement and obviously "did not have the opportunity to reflect on the beating or to fabricate a story."

People v. Burgos, 184 Ill.App.3d 474, 540 N.E.2d 456 (1st Dist. 1989) Stabbing victim's statement, about 10 to 15 minutes after the incident and upon being found in a hallway and bleeding profusely, was a spontaneous declaration. The fact that the statement was made in response to general questions ("who did this" and "who stabbed you") did not make it inadmissible.

People v. Brown, 170 Ill.App.3d 273, 524 N.E.2d 742 (2d Dist. 1988) The complainant testified that after she was sexually assaulted in her automobile, she drove the defendant back to town, dropped him off, followed defendant in an attempt to get his license number, and drove around for 10 to 15 minutes "debating what she should do." She then stopped at a gas station and called police. When an officer arrived about 10 minutes later, the complainant gave the detailed statement.

Because the complainant's own testimony showed that she "had the chance to reflect on what had occurred and that she did indeed reflect" before calling police, the statement was inadmissible hearsay.

People v. Woith, 126 Ill.App.3d 817, 467 N.E.2d 614 (4th Dist. 1984) Statements were not admissible as spontaneous declarations where, after the incident, the victim sat on the couch trying to calm herself and finished doing some dishes before walking to her cousin's house, where she made the statements. In addition, the victim did not make the statements immediately upon arriving at the cousin's house.

People v. Washington, 127 Ill.App.3d 365, 468 N.E.2d 1285 (1st Dist. 1984) Shooting victim's statement identifying defendants as his assailants was admissible as a spontaneous declaration where it was made 10 minutes after he was severely wounded. The trial court properly found that the victim did not have time to fabricate though he made a phone call and went to an apartment during the 10-minute-period.

People v. Smith, 127 Ill.App.3d 622, 469 N.E.2d 634 (1st Dist. 1984) The statements of a stabbing victim, made to police about five minutes after the incident, were properly introduced as spontaneous declarations. However, statements subsequently made while the victim was being questioned by an officer were not spontaneous - in these statements the

victim described the incident step by step, requiring him to "reflect upon the events that transpired and organize them in his mind."

People v. VanScyoc, 108 Ill.App.3d 339, 439 N.E.2d 95 (4th Dist. 1982) The defendant was convicted of the aggravated battery of a child he was babysitting, based primarily on out-of-court statements of two other children admitted as spontaneous declarations. The Appellate Court held that the statements were improperly admitted because they were made three to four hours after the incident and during a period when the children were not upset or startled. Thus, the spontaneity necessary for a spontaneous declaration was lacking "both because of lapse of time and a lack of showing that the children were still startled from the event purportedly witnessed by them."

People v. Miller, 58 Ill.App.3d 156, 373 N.E.2d 1077 (4th Dist. 1978) The trial court did not err in admitting testimony concerning the spontaneous declaration of a 13-year-old (the alleged victim of indecent liberties) even though the child was later found to be incompetent to testify.

People v. Jacobs, 51 Ill.App.3d 455, 366 N.E.2d 1064 (4th Dist. 1977) It was reversible error to allow the alleged rape victim's mother and boyfriend to testify about statements made by the victim concerning the incident. The statements did not come within the "spontaneous declaration" exception to the hearsay rule where the alleged victim said nothing at the scene - a mobile home where she was babysitting - waited until she returned home with her mother, and made a statement only after being questioned. Also, the alleged victim was not crying or visibly upset.

People v. Alexander, 11 Ill.App.3d 782, 298 N.E.2d 355 (1st Dist. 1973) Statements made five minutes after the occurrence, while complainant was crying and visibly upset, were spontaneous declarations. See also, **People v. Kilgore**, 39 Ill.App.3d 1000, 350 N.E.2d 810 (5th Dist. 1976) (20 minutes after incident); **People v. Collier**, 66 Ill.App.3d 1007, 384 N.E.2d 497 (2d Dist. 1978) (within minutes of the incident); **People v. Jones**, 108 Ill.App.3d 880, 439 N.E.2d 1011 (4th Dist. 1982) (15 minutes); **People v. Watson**, 107 Ill.App.3d 691, 438 N.E.2d 453 (3d Dist. 1982) (in hospital emergency room).

§19-14(b)
Corroborative Complaints

Illinois Supreme Court
People v. Damen, 28 Ill.2d 464, 193 N.E.2d 25 (1963); **People v. Davis**, 10 Ill.2d 430, 140 N.E.2d 675 (1957) A witness may properly testify about a statement made by an alleged rape victim if such statement constitutes a corroborative complaint. The following rules apply to corroborative complaints:

1. Such a statement or complaint is admissible only in rape cases. See also, **People v. Romano**,306 Ill. 502, 138 N.E. 169 (1923) (not admissible in indecent liberties cases); **People v. Gillman**, 91 Ill.App.3d 53, 414 N.E.2d 240 (2d Dist. 1980) (not admissible in contributing to sexual delinquency of minor cases); **People v. Evans**, 173 Ill.App.3d 186, 527 N.E.2d 448 (1st Dist. 1988) (admissible in an aggravated criminal sexual assault case**);** **People v. Woith**, 126 Ill.App.3d 817, 467 N.E.2d 614 (4th Dist. 1984) (did not apply to indecent liberties case).

2. The complaint must have been made without inconsistent or unexplained delay. See also, **People v. Secret**, 72 Ill.2d 371, 381 N.E.2d 285 (1978) (admissible when made the morning after the incident and as soon as practicable); **People v. Ristau**, 363 Ill. 538, 2 N.E.2d 933 (1936) (admissible when made the morning after the incident); **People v. Williams**, 146 Ill.App.3d 767, 497 N.E.2d 377 (1st Dist. 1986) (admissible when made the morning after the incident); **People v. Evans**, 173 Ill.App.3d 186, 527 N.E.2d 448 (1st Dist. 1988) (admissible when made two hours after the incident); **People v. Fuelner**, 104 Ill.App.3d 340, 432 N.E.2d 986 (1st Dist. 1982) (not admissible when made on the evening of the day after the incident); **People v. Russell**, 177 Ill.App.3d 40, 531 N.E.2d 1099 (2d Dist. 1988) (statement made at the police station several hours after the incident, and after victim previously denied to a police officer that a rape occurred, was not admissible).

3. The complaint must not be made in response to questioning other than general questions. See also, **People v. Taylor**, 48 Ill.2d 91, 268 N.E.2d 865 (1971) (inadmissible where made in response to questioning); **People v. Harris**, 134 Ill.App.3d 705, 480 N.E.2d 1189 (1st Dist. 1985) (inadmissible where made in response to questioning); **People v. Evans**, 173 Ill.App.3d 186, 527 N.E.2d 448 (1st Dist. 1988) (general questions such as "what's wrong" or "did he do something to you" did not make the complaint inadmissible).

4. Because the complaint is admissible only to corroborate the complainant's testimony, the exception is inapplicable unless the declarant testifies at trial. **People v. Furlong**, 392 Ill. 247, 64 N.E.2d 460 (1945); **People v. Merideth**, 152 Ill.App.3d 304, 503 N.E.2d 1132 (2d Dist. 1987).

5. Testimony about a corroborative complaint must be limited to the fact that a complaint was made, and may not include details of the occurrence or the name or description of the perpetrator. See also, **People v. Robinson**, 73 Ill.2d 192, 383 N.E.2d 164 (1978); **People v. Russell**, 177 Ill.App.3d 40, 531 N.E.2d 1099 (2d Dist. 1988); **People v. Maberry**, 193 Ill.App.3d 250, 549 N.E.2d 974 (4th Dist. 1990); **People v. Brown**, 170 Ill.App.3d 273, 524 N.E.2d 742 (2d Dist. 1988).

People v. Robinson, 73 Ill.2d 192, 383 N.E.2d 164 (1978) The Supreme Court discussed the distinctions between a "spontaneous declaration" and a "corroborative complaint" in a rape case, and held that the complainant"s statement to a police officer, after she had discussed the incident with two other people, did not come within the spontaneous declaration exception but was admissible as a "corroborative complaint."

It was error for the testimony about the corroborative complaint to include any of the details regarding the crime, including the identity of the assailant. However, such improper hearsay was not reversible error in this case.

People v. Secret, 72 Ill.2d 371, 381 N.E.2d 285 (1978) Where rape complainant testified that she arrived at defendant's apartment about 2:00 a.m., was raped three times, and was afraid to leave the apartment until she was sure that defendant had fallen asleep, her report of the rape to police at 7:00 a.m. was properly admitted as a "corroborative complaint." The Court discussed the distinctions between a "spontaneous declaration" and a "corroborative complaint," and noted there is no definite time limit within which a corroborative complaint must be made. In this case, however, the complaint was made as soon as practicable. See also, People v. Lawler, 142 Ill.2d 548, 568 N.E.2d 895 (1991) (statement could not qualify as a prompt complaint where it was made before the alleged rape and in response to a series of questions).

People v. Taylor, 48 Ill.2d 91, 268 N.E.2d 865 (1971) Testimony about complaint of rape victim was not admissible as either a spontaneous declaration or a corroborative complaint. The complaint was made in response to questions, and "had the questions not been asked the statement would not have been made."

Illinois Appellate Court

People v. Russell, 177 Ill.App.3d 40, 531 N.E.2d 1099 (2d Dist. 1988) Statements the complainant made five to six and 30 hours after the incident did not qualify as corroborative complaints. Under the corroborative complaint rule, "only the fact of a complaint is admissible and not, as here, the complete details of the alleged offense, or the name of the accused."

Even had the testimony been properly limited, it was inadmissible because the complainant's statements "were not made as soon as was practicable under the circumstances of this case." The complainant did make a prompt and spontaneous complaint to a woman who lived in an apartment that was near the scene, but then denied to the responding officer that there had been a rape. She also declined to make a report. The complainant returned home for five to six hours, and then drove to a friend's place of employment, where "in response to an inquiry [she] said she had been raped." The complainant's "inconsistent delay in making a complaint to the authorities, or anyone else, during this period will preclude admission" of her statement under the corroborative complaint exception."

Similarly, the complainant's later statements to a different police officer did not qualify as corroborative complaints.

People v. Fuelner, 104 Ill.App.3d 340, 432 N.E.2d 986 (1st Dist. 1982) The complainant's statement that she had been raped was not admissible as either a spontaneous declaration or corroborative complaint, since it was not made until the evening of the day after the incident.

People v. Andino, 99 Ill.App.3d 952, 425 N.E.2d 1333 (2d Dist. 1981) The defendants, inmates of a county jail, were convicted of deviate sexual assault against another inmate. The complainant testified that 14 hours after the incident, he made a complaint to jail officials. A jail officer was allowed to testify that the complainant made the above complaint and that it was in accord with his trial testimony.

The Appellate Court held that the jail official's testimony was improperly admitted since it was hearsay and did not come within any of the hearsay exceptions. The complainant's statement was not a spontaneous declaration since it was not made until 14 hours after the incident. Also, the statement was not a corroborative complaint since such complaints are admissible only in rape cases and may only include the fact of the complaint and not details of the incident.

People v. Jacobs, 51 Ill.App.3d 455, 366 N.E.2d 1064 (4th Dist. 1977) It was reversible error to allow the alleged rape victim's mother and boyfriend to testify about statements made by the victim concerning the incident. The testimony concerning the statement was not admissible under the "corroborative statement" exception where the testimony went beyond showing the mere fact of a complaint, and contained details of the occurrence.

§19-14(c)
Statements Under 725 ILCS 5/115-10

Under 725 ILCS 5/115-10, testimony about certain statements by the alleged victims of child sexual abuse is admissible as an exception to the hearsay rule. Section 5/115-10 applies where the declarant is under the age of 13 or is an "institutionalized severely or profoundly mutually retarded person," and requires the trial court to find that the statements in question are sufficiently reliable. In addition, the child must either testify or there must be corroborative evidence of the act that is the subject of the statement.

Illinois Supreme Court

In re Brandon P., 2014 IL 116653 The court agreed with the State's concession that out-of-court statements made by the three-year-old complainant to a police officer were "testimonial" for purposes of the confrontation clause. Statements to police are testimonial when the circumstances objectively indicate that the primary purpose of the interrogation is establish past events potentially relevant to criminal prosecution.

Here, the primary purpose of the interview was to establish events for a potential criminal prosecution. Thus, statements made during the interview were testimonial.

The court agreed with the State's concession that the three-year-old was unavailable to testify for purposes of 725 ILCS 5/115-10. Under §115-10, "unavailable" witnesses include children who are unable to testify because of fear. **People v. Stechly**, 225 Ill. 2d 246 (2007).

The record here shows that the complainant was unavailable because of her fear and youth. She could barely answer the trial court's preliminary questions, and froze when the State began its direct examination. The trial court, defense counsel, and the prosecutor all agreed that the complainant was unavailable. Under these circumstances, the trial court did not abuse its discretion by finding that the witness was unavailable for purposes of §115-10.

People v. Kitch, 239 Ill.2d 452, 942 N.E.2d 1235 (2011) A statute is unconstitutional on its face only if no set of circumstances exist under which it would be valid.

Section 115-10 of the Code of Criminal Procedure, 725 ILCS 5/115-10 allows admission of a child victim's hearsay statements under two scenarios: (1) the court finds the statement reliable and the child testifies at trial, or (2) the child does not testify, the court finds the statement reliable, and the allegation of sexual abuse is independently corroborated.

The confrontation clause places no restriction on the admission of hearsay testimony under scenario one above since the declarant testifies at trial and is present to defend or explain that testimony. Where the child does not testify under scenario two above, testimonial statements are admissible under **Crawford v. Washington**, 541 U.S. 36 (2004), only if the defendant had a prior opportunity to cross-examine the declarant.

That under both scenarios the statement must also meet the additional reliability requirement set forth in **Ohio v. Roberts**, 448 U.S. 56 (1980), that was repudiated in **Crawford**, is not problematic. This requirement only provides the defendant with additional protection over and above that provided by the confrontation clause. It does not affect the constitutionality of § 115-10 because the hearsay testimony must still satisfy **Crawford**'s constitutional requirements in addition to the statutory requirement of reliability. The evidentiary question of whether hearsay testimony satisfies a statutory exception such as § 115-10 is separate from, and antecedent to, the issue of whether admitting the testimony satisfies the confrontation clause. Therefore, the fact that § 115-10 does not incorporate the limitations on admissibility imposed by **Crawford** does not affect its constitutionality.

People v. Sargent, 239 Ill.2d 166, 940 N.E.2d 1045 (2010) 725 ILCS 5/115-10 authorizes the trial court to admit hearsay statements made by minor declarants who are the victims of specified sex offenses, if the court finds that the statements provide sufficient guarantees of

trustworthiness. If such hearsay is admitted, the court "shall instruct the jury that it is for the jury to determine the weight and credibility to be given the statement and that, in making the determination, the court shall consider the age and maturity of the child, . . . the nature of the statement, the circumstances under which the statement was made, and any other relevant factor." (725 ILCS 5/115-10(c))

The court acknowledged that the trial court erred by failing to instruct the jury in accordance with §115-10, but held that defense counsel waived the issue by failing to request an instruction and present the issue in the post-trial motion. Furthermore, the plain error rule did not apply.

First, the evidence was not closely balanced. Second, the jury was given an instruction based on the general IPI instruction concerning the credibility of witnesses (Crim. No. 1.02), and therefore was aware of many of the principles specified by §115-10.

The court stressed that it was not suggesting that courts have discretion to tender instructions based on general IPI instructions instead of the IPI instruction implementing §115-10 (IPI Crim. No. 11.66), but only that under the circumstances of this case the failure to comply with §115-10 did not constitute plain error.

People v. Cookson, 215 Ill.2d 194, 830 N.E.2d 484 (2005) The court rejected defendant's argument that testimony admitted under 725 ILCS 5/115-10 violates **Crawford v. Washington**, 541 U.S. 36 (2004). Crawford does not apply to testimony admitted under §115-10 because the statute requires the child to be available to testify and therefore subject to cross-examination.

The circumstances of the statements provided sufficient indicia of reliability to be admitted under §115-10. The court rejected arguments that the 7-year-old complainant used language and exhibited a level of knowledge of sexual activity that would be unusual for a child of her age, noting that she had been exposed to "an appalling environment of prostitution and drug use."

The court also acknowledged testimony that defendant's natural father told her to say "bad things" about the defendant, and that the complainant spent a significant amount of time in the natural father's custody. The court found that such evidence did not establish lack of reliability because the complainant readily admitted that the natural father had prompted her to speak ill of the defendant, but expressly denied that he had told her to falsely claim that defendant had sexually abused her. The court also noted that the trial judge had the advantage of observing the witnesses before concluding that the accusations against defendant were not a result of the natural father's directions.

Although there was evidence suggesting that the complainant tended to confuse the defendant and her natural father, that evidence arose only at trial and therefore could not have been considered by the trial judge at the pretrial reliability hearing. In addition, at trial defendant failed to renew his objection after that evidence was admitted, the minor repeatedly referred to defendant by his first name rather than as her father (reducing the likelihood of a mistaken identification), and the minor did not vacillate concerning the identity of her abuser.

The court noted, however, that some of the statements occurred during an interview by a DCFS investigator and a detective, who did not videotape the interview despite the availability of videotaping equipment. The court stated, "While we believe the lack of a contemporaneous video recording does not render the interview unreliable . . ., we once again strongly admonish law enforcement personnel and social workers to record those interviews whenever possible."

People v. Williams, 193 Ill.2d 306, 739 N.E.2d 455 (2000) The trial judge did not err by admitting, under §115-10, statements made by a seven-year-old. The murders of the decedent's mother and sister pertained to acts which were an element of an offense committed against the child. The declarant was the victim of an aggravated kidnapping, which requires evidence of secret confinement of a child under the age of 13 without the consent of his parent or guardian. The court concluded that the statements indicated how the child came to be confined by the defendant and established that the confinement was without the mother's consent.

In addition, the child's denial that he took medication pertained to an act which formed the basis of an offense against the child, because after claiming that the mother had left medication defendant gave the child a substance which caused him to gag and vomit.

People v. Lofton & Stewart, 194 Ill.2d 40, 740 N.E.2d 782 (2000) A defendant is entitled to attend a hearing on a 725 ILCS 5/115-10 motion to admit hearsay statements by the child victim of specified sexual offenses. A criminal defendant may waive the right to attend a critical hearing, but must do so knowingly and voluntarily. Here, there was no indication that defendant waived his right to attend the §115-10 hearing.

People v. Bowen, 183 Ill.2d 103, 699 N.E.2d 577 (1998) It is not error to admit a videotape of a statement that is admissible under §115-10. Section 115-10 authorizes admission of hearsay testimony concerning a child's out-of-court statements about acts of sexual abuse, without specifically referring to the form that such testimony can take.

The court rejected defendant's claim that the videotape was unreliable because it contained some suggestive questioning. The court failed to discern any improper questioning, and the statement's reliability was buttressed by the fact that it was only the second comprehensive interview by authorities, the child had made prior consistent statements to her mother and to a caseworker, and there was no evidence of any motive to fabricate on the part of the minor, her family, police officers or DCFS investigators.

People v. Holloway, 177 Ill.2d 1, 682 N.E.2d 59 (1997) Section 115-10 was intended to apply only where the hearsay statement in question was made before the complainant reached the age of 13, and not where the alleged offense occurred before age 13 but the statement was made after the complainant reached that age. The Court found that in enacting the statute, the legislature had two concerns: (1) "the ability of the victim to understand and articulate what happened during the incident," and (2) "the reluctance many victims have relating the details of the incident at trial." Thus, the concern was not "the age of the victim when the assault occurs," but the inability of a youthful victim to adequately testify.

People v. West, 158 Ill.2d 155, 632 N.E.2d 1004 (1994) 725 ILCS 5/115-10 does not require the trial judge to state specific reasons for finding that a statement is sufficiently reliable to be admitted.

People v. Mitchell, 155 Ill.2d 344, 614 N.E.2d 1213 (1993) In a jury trial, it is error to admit statements under §115-10 without first holding a reliability hearing outside the presence of the jury.

The trial court committed plain error by failing to instruct the jury according to §115-10(c), which requires that the jury be instructed concerning the factors to consider in weighing the statements. See also, **People v. E.Z.**, 262 Ill.App.3d 29, 633 N.E.2d 1022 (2d Dist. 1994) (trial judge erred by admitting a statement under §115-10 without first holding a

hearing to determine whether the time, content and circumstances guaranteed the statement's reliability, and by failing to instruct the jury about the factors to consider in deciding the weight and credibility of the child's statements).

People v. Zwart, 151 Ill.2d 37, 600 N.E.2d 1169 (1992) The statements of a three-year-old were insufficiently reliable to be admitted under §115-10 where the complainant had been interviewed by at least three people - a police officer, a DCFS caseworker and a hospital counselor - before making the statements. As the proponent of the hearsay, the State bore the burden of establishing that the statements were not the result of "adult prompting or manipulation." Because the State failed to introduce any evidence concerning the three intervening interviews, it failed to establish that the statements were accurate reflections of actual occurrences rather than the result of suggestive interviewing techniques. Such a possibility was especially troubling in this case because the complainant's age made her particularly susceptible to outside suggestion and because she was found incompetent to testify and could not be questioned about the interviews.

The timing of the statements also made their reliability suspect. The first statement was not made until some five weeks after the alleged abuse, and the complainant initially denied having been abused when questioned by a counselor at the hospital. Although delay in reporting sexual abuse or initial denials do not automatically render a statement unreliable, those factors are significant in this case because the first claims of abuse were made only after "substantial adult intervention." See also, **People v. Wittenmyer**, 151 Ill.2d 175, 601 N.E.2d 735 (1992) (the trial court's finding that statements were reliable under Ch. 38, §115-10 was supported by the evidence where the detective did not ask leading questions, the answers were in the complainant's own words, and there was no evidence of coercion or intimidation; there is no requirement that a statement can be admitted only if it was recorded or attended by a defense representative); **People v. McMillan**, 231 Ill.App.3d 1022, 597 N.E.2d 923 (1992) (affirming trial court's ruling that the minor's out-of-court statements to a DCFS worker were insufficiently reliable to be admitted.)

Illinois Appellate Court

People v. Johnson, 2023 IL App (4th) 220201 Defendant could not invoke plain error on appeal from the trial court's decision to admit a child witness's statements under section 115-10. Defense counsel invited the error by stipulating that the statement met the statutory requirements. The appellate court rejected defendant's argument that the trial court had an independent duty to ensure compliance with section 115-10 regardless of defense counsel's stipulation. In making this argument, defendant attempted to analogize the court's independent duty in fitness cases, but those cases have a constitutional component while section 115-10 does not.

Nor was counsel ineffective for stipulating, as the appellate court found the out-of-court statements sufficiently reliable under section 115-10. The 8-year-old complainant made a spontaneous outcry to her grandmother, accusing her grandfather of sexual assault, and while she denied the claims in an initial interview with the child advocate, she explained in her second interview that defendant told her to keep it secret. The allegations in the second interview were detailed, unlikely to be fabricated, and made without an apparent motive to lie.

Finally, the introduction of the statement did not violate confrontation rights. The confrontation clause is generally satisfied as long as the witness is present and answers questions. Here, the complainant took the stand and answered all questions posed by both parties. Defendant noted that the witness did not provide accusatory testimony and thereby

limited his opportunity for cross-examination. He asserted that before introducing the statement, the State had to elicit the accusatory testimony in order to adequately set up cross-examination. The appellate court disagreed and blamed defense counsel for the lack of cross-examination on the statement. Although **People v. Learn**, 396 Ill. App. 3d 891 (2009), found a violation where the child witness could not answer any questions and the prosecutor ceased questioning prior to any accusatory testimony, that case was distinguishable. In addition to answering all questions, the complainant here confirmed making her prior statements and attested they were true.

People v. Rodriguez, 2022 IL App (1st) 200315 The trial court did not err when it viewed a video recording of the complaining witness's interview outside of defendant's presence as part of the hearing on the State's motion to admit the interview under 725 ILCS 5/115-10. A defendant has the right to be personally present at all critical stages of the proceedings against him and at any proceedings where his presence would contribute to the fairness of the procedure. But, that right is not absolute, and a defendant's absence will not constitute error unless it resulted in an unfair proceeding or the denial of an underlying substantial right.

Here, defendant was present in court for the 115-10 hearing, which included the testimony of multiple witnesses. His absence during the court's review of the video did not render the proceeding unfair and did not result in the denial of any substantial right. The video was ultimately played at defendant's jury trial while defendant was present. Accordingly, defendant was able to see and hear the evidence before making a decision about whether to testify in his defense. Further, the record showed that defendant had been afforded an opportunity to review the video with counsel months prior to trial, as well.

People v. Lee, 2020 IL App (5th) 180570 The trial court denied the State's 115-10 motion to admit prior statements of the child victims in a sexual assault case. The State filed an interlocutory appeal, but the Appellate Court held that it lacked jurisdiction. Rule 604(a)(1) allows the State to appeal "an order or judgment the substantive effect of which results in *** suppressing evidence." But evidence is not "suppressed" when a party may present that same evidence via different means. Here, the child victims would testify at trial, giving the State an opportunity to present the same information it sought to present through section 115-10.

People v. Riggs, 2019 IL App (2d) 160991 Following conviction on multiple counts of predatory criminal sexual assault, defendant contended that he was deprived of his constitutional right to confront the child victim because, although the court admitted her hearsay statements accusing him of numerous offenses, she testified on direct examination about only three such incidents. Thus, defendant argued, she was not available to "defend or explain" her out-of-court statements about the other offenses.

The Appellate Court affirmed. As long as the witness takes the stand and willingly answers questions, defendant is afforded his right to confront the witness. There is no rule that the witness' direct examination must mirror the hearsay statements, or include every allegation contained in them. The court distinguished **People v. Learn**, 396 Ill. App. 3d 891 (2009), because in that case the victim could not offer any testimony about any of the alleged offenses.

People v. Boling, 2014 IL App (4th) 120634 §115-10 is not limited to hearsay statements that directly describe the elements of the charged offenses. Instead, §115-10 authorizes admission of a "matter or detail pertaining to any act which is an element of an offense," including statements relating to the relationship between the child and defendant if such statements are relevant to explain the context in which the alleged acts occurred. Similarly, statements which relate steps defendant allegedly took to conceal his relationship with the child from others may be admitted under §115-10.

Also, hearsay statements by the complainant concerning defendant's apparent sexual abuse of another child may be admissible under §115-10. Where the complainant believed that the second child, a cousin who was about the same age as the complainant, was being abused by defendant in the same room where the complainant had been abused, her statements and conclusions were admissible to corroborate her claims and to provide the jury with an understanding of the psychological aspects of the defendant's abusive relationship with the declarant. "In this sense, [the complainant's] statements described a matter or detail pertaining to the charged offenses."

Statements which the complainant made to a nurse/sexual assault examiner and which identified defendant as the attacker were admissible under §115-13. Furthermore, §115-13 authorized admission of statements concerning the defendant's threats to harm the complainant's pets if she told anyone about the abuse, because those statements were relevant to the declarant's state of mind and emotional condition.

However, §115-13 did not authorize admission of the declarant's statements that: (1) defendant apparently abused another person, and (2) the declarant told her mother about the abuse because she "heard that maybe it had happened to some other kids." These statements were not reasonably pertinent to the declarant's diagnosis or treatment.

Because the State's case in a prosecution for sex offenses against a child was based on the credibility of minor witnesses, the court found that the evidence was closely balanced. Thus, the plain error rule applied. Because defendant was denied a fair trial by the cumulative effect of several errors including the erroneous admission of hearsay evidence, allowing a prosecution witness to testify concerning the credibility of the complainant, and commenting in closing argument on the credibility of witnesses, the convictions were reversed and the cause remanded for a new trial.

People v. Lard, 2013 IL App (1st) 110836 Defendant claimed that the opportunity for cross-examination at a preliminary hearing was inadequate to justify admission of a deceased police officer's testimony under either §115-10.4 or the confrontation clause.

The confrontation clause does not require that counsel have an opportunity at the preliminary hearing to ask about every fact that might be relevant at trial. Thus, the opportunity to cross-examine may have been adequate at the earlier hearing even where discovery materials disclose new information which is relevant to cross-examination. What matters is that at the preliminary hearing defense counsel had a "fair opportunity" to inquire into the witness's observation, interest, bias, prejudice, and motive. Furthermore, to the extent that a witness at the preliminary hearing testifies to facts showing probable cause to believe that the defendant committed an offense, the defense has a motive to test the witness's credibility, powers of observation, and ability to recall.

Because defense counsel cross-examined the officer at the preliminary hearing and asked about his powers of observation and recall, just as would have been done at trial, the court concluded that the preliminary hearing testimony was properly admitted. Although at trial the defense had access to discovery that had not been available at the prior hearing,

defendant did not show how he would have benefitted from additional cross-examination based on information gleaned from the discovery.

People v. Oats, 2013 IL App (5th) 110556 Under 725 ILCS 5/115-10(a) and (b)(3), hearsay statements concerning sexual acts perpetrated against minors under the age of 13 may be admitted under certain circumstances. Before such hearsay is admitted, the trial court must conduct a hearing outside the presence of the jury and find that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. The State has the burden of proving that statements are reliable and not the result of prompting or manipulation.

Reliability is determined by the totality of the circumstances. Among the factors to be considered are the spontaneity and consistent repetition of the statement, the mental state of the child in giving the statement, the use of terminology that would be unexpected by a child of comparable age, and any lack of motive to fabricate.

The court concluded that hearsay statements were not unreliable merely because the first time the children were interviewed, the audio portion of the recording process malfunctioned and only the video portion was preserved. The court stressed that the State presented detailed testimony that the minors were treated in a manner that protected against suggestiveness, second interviews were conducted when it was discovered that the audio had not been recorded in the first interview, and two witnesses testified that the second interviews were substantially the same as the first. The court also noted that there was no prompting or suggestiveness in the second interviews. Under these circumstances, the statements were not rendered unreliable by the inadvertent failure to properly record the first interviews. Thus, the trial court did not err by admitting the statements into evidence.

People v. Orengo, 2012 IL App (1st) 111071 "In a prosecution for a physical or sexual act perpetrated upon or against a child under the age of 13," evidence of out-of-court statements made by the child is admissible as an exception to the hearsay rule under certain specified circumstances. 725 ILCS 5/115-10.

A discharge hearing is conducted pursuant to 725 ILCS 5/104-25 to determine whether to acquit a defendant of the charges when there has been a finding of unfitness. The discharge hearing is not a criminal prosecution. The defendant may not be convicted at the hearing. If the evidence is sufficient to establish his guilt, he is found not not guilty. But the purpose of the hearing is the same as that of a criminal trial—to test the sufficiency of the State's evidence of defendant's guilt of the charged crime. The standard of proof is the same. It follows that, unless otherwise noted in §104-25, the rules of evidence governing a criminal proceeding apply at a discharge hearing.

Subsection (a) of §104-25 provides that hearsay or affidavit evidence may be admitted at a discharge hearing "on secondary matters such as testimony to establish the chain of possession of physical evidence, laboratory reports, authentication of transcripts taken by official reporters, court and business records, and public documents." 725 ILCS 5/104-25(a).

The statute's silence on the admission of hearsay evidence on primary matters does not reflect the legislature's intent to bar such evidence. Subsection (a) does not evidence the legislature's intent to provide greater protection of a defendant's rights at a discharge hearing than at a criminal trial. Such an interpretation of subsection (a) would be inconsistent with the Illinois Supreme Court's interpretation in **People v. Waid,** 221 Ill. 2d 464, 851 N.E.2d 1210 (2006), which upheld the constitutionality of subsection (a) against due process and confrontation clause challenges.

Therefore, it was not error to admit hearsay evidence as provided by §115-10 at defendant's discharge hearing.

People v. Rivera, 409 Ill.App.3d 122, 947 N.E.2d 819 (1st Dist. 2011) Certain statements by the complainant are admissible in the prosecution of certain offenses perpetrated against a child under the age of 13, but the out-of-court statements must have been made before the complainant attained 13 years of age or within three months after the commission of the offense, whichever is later. 725 ILCS 5/115-10(b)(3). The note containing the statements at issue was written after the complainant turned 14, and did not qualify as a statement made within three months of the date of the commission of the offense, as the State never clearly established the date of the last sexual act between defendant and complainant.

People v. Martin, 408 Ill.App.3d 891, 946 N.E.2d 990 (2d Dist. 2011) Under 725 ILCS 5/115-10.1, an out-of-court statement may be admitted if it: (1) is inconsistent with the declarant's testimony at trial, (2) is the subject of cross-examination of the declarant, (3) was made under oath or described an event of which the witness had personal knowledge, and (4) was written or signed by the witness, acknowledged under oath, or recorded electronically.

The prior statement need not directly contradict the trial testimony in order to be admitted. Instead, the term "inconsistent" includes evasive answers, silence, or changes in position. "One of the policies underlying §115-10.1 . . . is to protect parties from 'turn coat' witnesses who back away from a former statement made under circumstances indicating that it was likely to be true." (**People v. Tracewski**, 399 Ill.App.3d 1160, 927 N.E.2d 1271 (4th Dist. 2010)).

The trial court properly applied §115-10 to admit a written statement of the complainant, who claimed at trial that she had been drinking on the night of the offense and did not recall any incident with the defendant. In the written statement, which had been prepared at the request of the arresting officers, the complainant stated that defendant grabbed her arm while she was driving and then hit her in the face. At trial, the complainant did not recall talking to police on the night of the offense. However, she identified the document as being in her handwriting.

The court concluded that the written statement contradicted the complainant's claim that she was unable to recall the incident, and noted that the trial court found that the complainant was being evasive at trial. Furthermore, the written statement explained events which were within the witness's personal knowledge when the statement was made, and the witness acknowledged making the statement by identifying the handwriting. Finally, the complainant was subject to cross-examination because she testified and responded to defense counsel's questions, although she was unable to recall the event. "[A] witness who appears and is able to testify is not unavailable for cross-examination simply because he or she cannot recall some events."

Under **Crawford v. Washington**, a testimonial statement by an unavailable witness is inadmissible unless the defendant had a prior opportunity for cross-examination. However, where the declarant appears for cross-examination at trial, the Confrontation Clause does not restrict use of her prior testimonial statements.

The court found that the factors leading to the conclusion that the complainant was available for cross-examination under §115-10 apply equally to the **Crawford** inquiry. Thus, **Crawford** is satisfied where a witness appears, answers questions, and is cross-examined, even if she is unable to remember some events.

Because the witness's out-of-court statement was properly admitted, defendant's convictions for aggravated battery and domestic battery were affirmed.

People v. Lara, 2011 IL App (4th) 080983-B The trial court did not abuse its discretion by finding that a five-year-child's videotaped statement to a police officer was sufficiently reliable to be admitted under §115-10. Because the officer asked open-ended questions and did not attempt to lead the child in her answers, the statement described conduct with which a typical four or five-year-old child would not be familiar, the child gave detailed testimony about defendant's actions, the record showed no motive for fabrication, and the officer who was interviewing the declarant did not believe she had been coached, the trial court did not abuse its discretion by finding that the statement was reliable.

The court rejected the argument that contradictions between the pretrial statement and the child's testimony at trial made the former too unreliable to be admitted. First, the testimony "was not so much inconsistent with the videotaped statement as it was less complete," at least partially because during her testimony neither party asked the child specific questions about statements she made before trial.

Furthermore, the jury was able to assess the child's credibility, and might well have concluded that the pretrial statement was more complete and believable because it occurred closer to the events in question.

People v. Learn, 396 Ill.App.3d 891, 919 N.E.2d 1042 (2d Dist. 2009) A four-year-old complainant did not "testify," as that term is defined under §115-10, where she admitted that a person by the name of the defendant existed only after some ten pages of questioning and gave no information about the defendant other than that he was the husband of the complainant's aunt and that the witness did not like him. When the child was asked about going to the police station and whether she had been asked questions there, she began to cry. After a short recess, the State informed the court that it had no more questions.

A child witness is considered "unavailable" if he or she is unwilling or unable to testify because of fear, unable to communicate in the courtroom setting, or declared incompetent because she is incapable of expressing herself so as to be understood. It makes no difference whether the witness becomes unavailable before or after taking the witness stand.

The court rejected the argument that mere presence in court and willingness to answer general questions that do not concern the offense are sufficient to qualify as "testimony." Instead, if a particular witness is the only person other than the hearsay witnesses who could accuse the defendant of actions constituting the offense, she is considered to have "testified" within the meaning of §115-10 only if he or she testifies about the offense.

Because the child in this case did not testify at all about the charge and barely acknowledged the matters on which she was questioned, she did not "testify" as contemplated by §115-10. Because the complainant was "unavailable" to testify under §115-10, her hearsay statements could not be admitted under that section.

The court found that the child's statements to two police officers were clearly "testimonial," as they were made during police interrogations which were intended to establish or prove past events potentially relevant to criminal prosecutions. Since the child did not testify and the defendant had no prior opportunity for cross-examination, the trial court erroneously admitted the testimony by the officers.

The court concluded, however, that the minor's statements to her father were non-testimonial. Where a statement is not the product of law enforcement interrogation, the proper focus in determining whether the statement is testimonial is the intent of the declarant and whether the objective circumstances would lead a reasonable person to conclude that their statement could be used against the defendant. Where the declarant is a

child, the child's age may be an objective circumstance to be taken into account in determining whether a reasonable person under the circumstances would have understood that her statement could be available for use at a later trial.

The court concluded that it would not be reasonable to expect a four-year-old to understand that her statements would be available for use at trial, where the child did not initially accuse the defendant and did not appear to realize that defendant's actions were inappropriate.

Where a child does not testify at trial, §115-10 allows introduction of certain hearsay if there is corroborative evidence of the act which is the subject of the statement. Here, there was no corroborative evidence of any act; the only evidence presented concerned various recitations of the child's out-of-court statements. Thus, the statements were not admissible under §115-10.

Finally, the court noted that it was error to allow a police officer who heard the minor's statements only through the testimony of an interpreter to testify at trial concerning the substance of those remarks. Because §115-10 mandates that the testifying witness hear the child's remarks personally, only the interpreter who heard the child's remarks could testify concerning those remarks.

Defendant's conviction was reversed and the cause was remanded for a new trial.

People v. Johnson, 296 Ill.App.3d 53, 693 N.E.2d 1224 (1st Dist. 1998) The trial court erred by admitting the complainant's hearsay statements about defendant's alleged sexual conduct in Ohio, which was not a part of the charge. Section 115-10 specifically authorizes only hearsay testimony concerning a complaint of an "act or matter or detail pertaining to any act which is an element of the offense" being prosecuted.

People v. Simpkins, 297 Ill.App.3d 668, 697 N.E.2d 302 (4th Dist. 1998) The trial court abused its discretion by finding that statements were reliable, because the circumstances surrounding the statements were "particularly troubling." Approximately one month before the complainant implicated defendant, she was interviewed by the same investigator regarding the alleged sexual abuse of a sibling by a grandfather. The State failed to introduce any evidence regarding the substance of statements made by the complaint in the earlier interview - the investigator testified only that he could not recall what questions he had asked.

The court held that under **People v. Zwart**, 151 Ill.2d 37, 600 N.E.2d 1169 (1992), where the State seeks to introduce statements under §115-10 it must: (1) establish the content of any previous interview of the complainant, and (2) show that the prior interview did not taint the statement which the State seeks to introduce.

There was not a sufficiently strong showing of reliability to overcome the State's failure to show the content of the prior interview. First, the statements which the State sought to introduce were not made spontaneously, but occurred in response to questioning about reports of sexual and physical abuse. Second, the complainant made inconsistent statements to various witnesses, and recanted her allegations a few months before the reliability hearing. Third, the statements were first made several months after the alleged incidents, and a motive to fabricate was suggested by the complainant's statement that she had lied about the alleged abuse because she was mad at the defendant. Under these circumstances, the statements were not shown to be reliable.

People v. Burnett, 239 Ill.App.3d 582, 607 N.E.2d 317 (3d Dist. 1993) Although there was no pre-trial reliability hearing before statements were admitted under §115-10, at a bench

trial the judge is presumed to have considered only admissible evidence. Therefore, the judge in this case may be presumed to have considered the time, content and circumstances of the complainant's statements even though he did not articulate specific findings. In addition, the judge specifically stated that the State's evidence, especially the complainant's testimony, was "clear and convincing." Under these circumstances, the failure to hold a separate reliability hearing was not reversible error. See also, **People v. Carter**, 244 Ill.App.3d 792, 614 N.E.2d 452 (1st Dist. 1993) (failure to hold reliability hearing is reversible error in a jury trial).

Although the State failed to give specific notice of its intention to introduce the complainant's statements, it "substantially complied" with the notice requirements of §115-10 where in discovery it disclosed the witnesses and reports containing the substance of their testimony. Compare, **People v. Carter**, 244 Ill.App.3d 792, 614 N.E.2d 452 (1st Dist. 1993) (furnishing normal discovery does not comply with special notice rules of §115-10).

People v. Embry, 249 Ill.App.3d 750, 619 N.E.2d 246 (4th Dist. 1993) The trial judge did not err by finding that the reliability of the six-year-old declarant's statements was sufficiently corroborated by defendant's pretrial statements. At the time of his arrest, defendant told a police officer that the six- and four-year-old girls had been the aggressors in the incident, had tried to watch him undress, and had pulled down his pants and grabbed his penis while he lay on the floor beside them. In addition, he claimed that the four-year-old had asked to lick defendant's penis and tried to put his penis in her mouth, and that the six-year-old had encouraged her sister in these actions.

The Court rejected the argument that corroborative evidence under §115-10 is limited to physical evidence or eyewitness testimony. The Court also concluded that defendant's statements "characterizing the victims as aggressors" clearly corroborated the six-year-old's hearsay statements.

However, the Court also cautioned that the State invited a mistrial by introducing the hearsay statements before calling the declarant to see whether she would testify. If the declarant refuses to testify after the hearsay statements have been admitted, and the State cannot present adequate corroborative evidence, the statements will have been improperly placed before the jury.

The Court also held that §115-10(a) does not authorize admission of hearsay concerning the sexual abuse of a victim other than the declarant. Thus, the trial court erred by concluding that §115-10 authorized admission of the six-year-old declarant's hearsay statements concerning sexual acts committed against her four-year-old sister. See also, **People v. Peck**, 285 Ill.App.3d 14, 674 N.E.2d 440 (4th Dist. 1996) (statements concerning acts against second complainant); **People v. Kinnett**, 287 Ill.App.3d 709, 679 N.E.2d 481 (2d Dist. 1997) (acts on different dates).

However, the statements concerning the four-year-old were properly admitted on another basis. Because the six-year-old declarant was also the victim of a separate sexual offense by the defendant, her statements about acts committed against her sister were admissible as "components of the contemporaneous and ongoing series of events" constituting an offense perpetrated against herself.

People v. Back, 239 Ill.App.3d 44, 605 N.E.2d 689 (4th Dist. 1992) There is no requirement that the complainant testify at the hearing to determine whether out-of-court statements about sexual abuse are sufficiently reliable to be admitted. Although §115-10 requires that the child must testify or that the statements must be corroborated, that provision refers to testimony at trial and not at the pretrial hearing.

There is no requirement that the first person to whom the child complained must testify at the reliability hearing so that it can be determined whether later statements were tainted by the response to the first statement. Under §115-10, reliability depends on the content, circumstances and timing of the statements which the State seeks to admit. There is no requirement of testimony by persons who heard statements that the State does not seek to admit.

The trial court's ruling (that statements were reliable) was not contrary to the manifest weight of the evidence. The complainant's failure to make a complaint until after the defendant moved out of her house merely reflects the fact that a child is likely to fear making reports of sexual assault while she is living with the perpetrator. In addition, the interviewers did not use leading questions and the complaints were made in language that would be expected from a 10-year-old child.

People v. Fowler, 240 Ill.App.3d 442, 608 N.E.2d 390 (1st Dist. 1992) Defendant was convicted of the aggravated criminal sexual assault of a seven-year-old girl. The Appellate Court ordered a new trial because the testimony of a state trooper and a social worker exceeded the scope of Ch. 38, §115-10(b)(1).

The social worker testified that complainant did not tell her mother about the incidents of abuse for several months because she was afraid she would get in trouble, and that such fear is typical of child sexual abuse victims, particularly girls of the complainant's age. The Court held that such testimony was beyond the scope of §115-10, which creates a hearsay exception only for complaints and details concerning acts of sexual abuse.

It was improper to permit the trooper to testify not only about what complainant told him, but also about her physical gestures during the interview. Rather than providing details included in the complainant's statement, such testimony was based on the trooper's interpretation of her physical actions.

Because the improper testimony constituted plain error which denied defendant a fair trial, the conviction was reversed and remanded for a new trial.

People v. Kelly, 185 Ill.App.3d 43, 540 N.E.2d 1125 (3d Dist. 1989) Testimony regarding a child-victim's complaint is admissible under §115-10 even though the complaint was not made promptly after the incident. Evidence of delay affects the weight of the testimony rather than its admissibility.

People v. Rushing, 192 Ill.App.3d 444, 548 N.E.2d 788 (4th Dist. 1989) Testimony concerning the details of the sexual acts contained in the child's complaint is permissible even though the child's trial testimony did not include such detail. Section 115-10 does not require every detail in the prior complaint to be corroborated by the child's testimony at trial.

Testimony regarding the child's complaint properly included the statement that after committing the sexual acts, defendant told the child not to tell anyone or he would kill her parents. "Due to the contemporaneous nature of the threat with the acts and the challenges made to [the child's] credibility, the threat has become integrally intertwined with the offense."

§19-15
Prior Inconsistent Statements

§19-15(a)
As Impeachment

Illinois Supreme Court

People v. Shatner, 174 Ill.2d 134, 673 N.E.2d 258 (1996) A party who is attempting to impeach a witness with a prior inconsistent statement must present the testimony of the person to whom the inconsistent statement was made. A witness may not be impeached with the written statement of the person to whom the inconsistent statement was allegedly made.

People v. Cruz, 162 Ill.2d 314, 643 N.E.2d 636 (1994) Under Supreme Court Rule 238(a), a witness can be impeached with a prior inconsistent statement only where her testimony damages the position of the impeaching party. There is no justification for impeaching the credibility of a witness who merely fails to support a party's position, because such impeachment merely brings inadmissible hearsay to the attention of the jury. In addition, because parties can in certain circumstances introduce inconsistent out-of-court statements as substantive evidence, the rule that impeachment is permitted only where a witness's testimony affirmatively damages the impeaching party's case must be "rigorously enforced."

"Damage" to a party's case does not occur where a witness is asked about a fact "which would be favorable to the examiner if true," but gives an answer that does not affirmatively help the questioner's case. Such testimony, while disappointing, causes no harm to the proponent's case, which is no better or worse off than if the witness had not testified at all.

The Court rejected the State's argument that the witness's neutral testimony damaged its case in the eyes of the jury because it contradicted the State's opening argument as to her testimony. "[I]mpeachment is designed to challenge the credibility of a witness" and is not a "means of rehabilitating counsel's arguments to the jury."

The State also improperly attempted to use the impeachment substantively in closing argument. The Court rejected the State's argument that the error was cured by the jury instructions, which said that evidence received for a limited purpose could not be considered for any other purpose and that prior inconsistent statements could be considered only to determine credibility. Where there is no proper purpose for which testimony can be admitted, an instruction purporting to limit the jury's consideration to a proper purpose cannot cure the "fundamental error."

People v. Redd, 135 Ill.2d 252, 553 N.E.2d 316 (1990) At trial, the State asked a witness about a statement he allegedly made to a neighbor soon after the incident. The witness declined to answer the questions, asserting his Fifth Amendment privilege. As impeachment, the State then called the neighbor, who testified about the statement.

The Supreme Court stated that it was error to "impeach" the witness with his prior statements after he asserted his Fifth Amendment privilege, because he neither admitted nor denied making the prior statement:

"The purpose of impeaching evidence is to destroy the credibility of a witness, not to establish the truth of the impeaching evidence." Thus, a witness who does nothing but raise a Fifth Amendment privilege asserts nothing except that he believes he has reasonable grounds to fear incriminating himself. "The only credibility issue . . . concerns whether or not [the witness] was being truthful" in that assertion, an issue that is for the court rather than the

jury to decide. Because the witness did not testify, it was error to allow him to be impeached by statements he allegedly made concerning the defendant.

People v. Bradford, 106 Ill.2d 492, 478 N.E.2d 1341 (1985) A "court's witness may be impeached by a prior inconsistent statement when the witness' testimony damages the position of the impeaching party." The impeaching party may also introduce evidence of the prior statements even though the witness admits making them. However, "lengthy or repeated references to prior inconsistent statements may indicate attempts by the prosecution to give the force of substantive evidence to the statements."

The State did not improperly use prior inconsistent statements by calling three witnesses to testify that the witness previously made three voluntary statements that were inconsistent with her trial testimony. Not only did the prosecution refrain from using additional witnesses who were available, but "[c]onsidering that [the witness] made inconsistent statements on three separate occasions, the prosecution's bringing out the statements was within the limited purpose of impeaching testimony."

The Court also found that two remarks by the prosecution in closing argument were not attempts to have the jury regard the doctor's testimony as substantive evidence, and that the jury was instructed that the prior inconsistent statements could be used only for determining credibility.

People v. Bryant, 94 Ill.2d 514, 447 N.E.2d 301 (1983) "This Court has repeatedly condemned prosecutorial efforts to impart substantive character to prior inconsistent statements under the guise of impeachment. Moreover, statements made outside the defendant's presence which relate his confession of guilt or innocence are not competent evidence even for impeachment purposes if likely to prejudice the jury."

People v. Cobb, 97 Ill.2d 465, 455 N.E.2d 31 (1983) Where defense counsel asked a witness whether she ever told anyone "you expected to receive a reward for testifying in this case," and when she responded "No" asked whether she ever told "Carol Griffin you were going to receive a reward for your testimony in this case," the trial judge erred by excluding Griffin's testimony due to an insufficient foundation. The witness was "properly alerted to or warned of her prior inconsistent statement by the questions that had been asked on cross-examination."

The court added that if the trial court believed that a proper foundation had not been made, it abused its discretion by refusing to allow defense counsel to recall the witness in order to perfect the foundation.

People v. Smith, 78 Ill.2d 298, 399 N.E.2d 1289 (1980) Before a witness may be impeached by a prior inconsistent statement, a foundation must be established by directing the attention of the witness to the time, place, circumstances and substance of the statement. This foundation is necessary to avoid unfair surprise and give the witness an opportunity to explain.

The foundation requirements were not substantially satisfied where the witness was asked only whether he had talked to a particular person about defendant's case - the witness was not alerted to the substance of the conversations or statements.

People v. Sanders, 56 Ill.2d 241, 306 N.E.2d 865 (1974) It is improper to allow a rebuttal witness to testify about a prior statement made by a defense witness without first alerting the latter to the circumstances and substance of the statement. See also, People v. Almo, 108

Ill.2d 54, 483 N.E.2d 203 (1985) (defendant properly precluded from asking a police officer about the prior statements of a witness who had not been asked about such statements).

People v. Moore, 54 Ill.2d 33, 294 N.E.2d 297 (1973) If a witness is asked and denies making a prior inconsistent statement, "it is incumbent upon the cross-examiner to offer evidence that such a statement was in fact made."

People v. Henry, 47 Ill.2d 312, 265 N.E.2d 876 (1970) A witness may be impeached with his failure to state a particular fact in a prior statement. The failure to state a particular fact, when it would have been natural or likely to assert it, amounts to an assertion of the nonexistence of the fact and is admissible to discredit testimony as to such fact. See also, **People v. Batchelor**, 202 Ill.App.3d 316, 559 N.E.2d 948 (1st Dist. 1990) (same); **People v. Conley**, 187 Ill.App.3d 234, 543 N.E.2d 138 (1st Dist. 1989) (impeachment by omission is permissible where: (1) it is shown that the witness had an opportunity to make a statement, and (2) under the circumstances, a person would normally have made the statement).

People v. Whitehead, 35 Ill.2d 501, 221 N.E.2d 256 (1966) Trial court's refusal to allow co-defendant to testify about alleged inconsistent testimony of complainant at preliminary hearing, after sufficient foundation, was reversible error.

People v. Paradise, 30 Ill.2d 381, 196 N.E.2d 689 (1964) To lessen the risk that the jury might consider a prior inconsistent statement as substantive evidence, the jury should "be clearly cautioned and instructed to limit its consideration of such evidence for its proper purpose."

People v. Dixon, 28 Ill.2d 122, 190 N.E.2d 793 (1963) In order to lay a foundation for impeachment by prior inconsistent testimony at an earlier trial, it is not necessary that the "exact questions" be read to the witness.

People v. Bush, 29 Ill.2d 367, 194 N.E.2d 308 (1963) When a witness testifies that he does not remember making the prior inconsistent statement, evidence of such statement may be introduced as impeachment. See also, **People v. Purrazzo**, 95 Ill.App.3d 886, 420 N.E.2d 461 (1st Dist. 1981) (proof that the prior statement was made is required when the witness claims he doesn't remember making the prior statement).

People v. Hicks, 28 Ill.2d 457, 192 N.E.2d 891 (1963) A witness should be allowed to explain prior inconsistent statements and to show the circumstances under which they were made. Also, all of the prior statements may be brought out to qualify or explain the inconsistency and rehabilitate the witness.

People v. Williams, 22 Ill.2d 498, 177 N.E.2d 100 (1961) Even where a witness admits making a prior inconsistent statement, the opposing party may introduce evidence of the statement. See also, People v. Bradford, 106 Ill.2d 492, 478 N.E.2d 1341 (1985) (same).

Illinois Appellate Court

People v. Mrdjenovich, 2023 IL App (1st) 191699 The trial court did not err in admitting defendant's six-year-old aggravated robbery conviction as impeachment at his murder trial.

The conviction occurred within 10 years and, as with any theft offense, was relevant to defendant's dishonesty. It therefore met the threshold requirements of Rule 609.

The probative value of the conviction was not substantially outweighed by its prejudicial effect. Both were negligible. Regarding probative value, other factors were far more relevant to defendant's credibility, including his admitted dishonesty before the grand jury and to the police. As for prejudicial effect, the murder did not involve a robbery so there was little fear the jury would improperly use the evidence for propensity, and the parties agreed to limit the details about the offense to its name and sentence.

People v. Williams, 2022 IL App (2d) 200455 At defendant's trial for the murder of his roommate, the prosecutor made improper remarks during closing argument regarding defendant's demeanor and temper. Specifically, the prosecutor told the jurors that the video recording of defendant at the police station showed that he was short-fused and had a temper, and then stated, "Is it possible a person like that could live with anybody? * * * [H]e came over and whatever was bothering him, he then took it out on [the victim]." The prosecutor also told jurors, "This is a person who's capable of going from zero to 100 like that. * * * And that's what happened here." It was error to argue that defendant's demeanor made it more likely that he committed murder.

But, the appellate court found the error harmless. The improper remarks constituted just 11 sentences of the prosecutor's 60-page closing arguments. And the jury was admonished that arguments were not evidence. Plus, there was substantial evidence against defendant, such that the arguments could not have impacted the outcome of his trial.

People v. Gladney, 2020 IL App (3d) 180087 Officers investigating an assault ordered three suspects to the ground and searched them. On one of the suspects, the officers found a bag of drugs. While testifying about his recovery of the bag, the officer stated that "other officers observed [defendant] passing" this bag to the suspect. A defense objection on hearsay grounds was overruled.

When the suspect with the bag took the stand, he stated that defendant passed him a cell phone, not a bag of drugs. Over defense objection, he admitted that, at the scene, he told the officer that defendant passed him that bag. He testified that this was untrue, and that he only stated so because he was scared. The State called an officer who heard the suspect's statement at the scene, and this officer testified, over objection to hearsay, that the suspect admitted defendant passed him the bag of drugs. The post-trial motion did not complain of the hearsay rulings.

The Appellate Court agreed with defendant that the first statement was hearsay, because it relayed the statements of the other officers in an attempt to prove the truth of the matter – that defendant possessed the drugs. But, the error was forfeited, and the evidence of defendant's possession was not closely balanced, as other officers witnessed the transaction and no cell phone was found on the other suspect. As for the suspect's statement at the scene, the court found no hearsay problem, as it met both the personal knowledge and acknowledgment requirements of Rule 801(d)(1)(A)(2)(b). Moreover, the statement was admissible as impeachment.

People v. Ware, 2019 IL App (1st) 160989 The trial court did not abuse its discretion when it precluded the defense from showing a witness's videotaped prior inconsistent statement to the police, despite allowing the defense to confront the witness about the statements. The trial court has discretion to limit the scope of impeachment, and in this case, the jury heard the witness's prior inconsistent statements. Showing the actual video of the statements would

have been cumulative. Although defendant argued that the video included hand gestures to illustrate how defendant held the gun in this self-defense case, the Appellate Court noted that the record is silent as to whether those hand gestures were inconsistent with any gestures made on the stand.

People v. Fillyaw, 2018 IL App (1st) 150709 At defendants' retrial, the court allowed the State to admit the prior trial testimony of an unavailable witness. The trial court erred, however, in refusing to allow defendants to impeach that prior testimony with a recantation affidavit from that witness. Under Illinois Rule of Evidence 806, where a hearsay statement is admitted at trial, its credibility can be attacked by any evidence the same as if the hearsay declarant had testified at the trial. And, under Illinois Rule of Evidence 901, the recantation affidavit could be authenticated by establishing a rational basis on which the fact-finder could conclude it had been written by the declarant. Here, defendants were prepared to call the witness who notarized the affidavit to establish its authenticity. The trial court's skepticism of the recantation is not a basis on which the affidavit could be excluded. And, the court's error was not harmless where the witness in question was important to the State's case.

People v. Lewis, 2017 IL App (4th) 150124 Defendant was convicted of aggravated battery based on choking a woman. At trial, a defense witness testified that she saw defendant and the woman swatting and pushing each other and she got between them to stop the fight, but she never saw defendant choke the woman. During cross, she testified that she spoke to a police officer about the incident, but did not remember telling him that defendant choked the woman twice. In rebuttal, the officer testified about everything the defense witness told him, including that defendant "grabbed" the woman twice around the neck.

On appeal, defendant argued that the State improperly introduced the witness's prior inconsistent statement as substantive evidence under 725 ILCS 5/115-10.1. The court rejected this argument holding that the evidence was never admitted as substantive evidence. Section 115-10.1 applies to "turncoat witnesses," when a party calls a witness who disowns a prior statement by testifying differently on the stand. Here, the witness testified as a defense witness and the State was only trying to impeach her on cross-examination with a prior inconsistent statement and then completing that impeachment by calling the officer who heard the statement. Nothing about this constituted using the prior statements as substantive evidence.

The court nevertheless found that the method the State used to impeach the witness was incorrect. The State should have directly asked the officer through leading questions whether the witness told him that defendant choked the witness twice. That would have allowed the officer to perfect the impeachment (or not) by simply answering yes or no. Instead, the State asked the officer an open-ended non-leading question about whether he recalled what the witness told him. That allowed the officer to improperly testify about everything the witness said instead of focusing on the impeaching portion of her statements. And it allowed the officer to use the ambiguous word "grabbed" instead of merely affirming or denying if the witness said "choked."

Defendant's conviction was affirmed.

People v. Blakely, 2015 IL App (3d) 130719 A prior inconsistent statement may be admitted for impeachment if a witness's testimony affirmatively damages the case of the party which presented the testimony. A case is affirmatively damaged when it is worse off than it would have been had the witness not testified and where the testimony positively assists the opposing party's case.

The court rejected the State's contention that under **People v. Leonard**, 391 IL App (3d) 926, 911 N.E.2d 403 (3rd Dist. 2009), a professed lack of memory regarding a prior statement may be damaging to a party's case. The court questioned whether **Leonard** actually made such a holding, and noted Appellate Court authority which explicitly states that a witness's lack of memory does not affirmatively damage a party's case. In any event, Illinois Supreme Court precedent holds that affirmative damage to a party's case does not occur where the party interrogates a witness about a fact which would be favorable if true, but receives a reply which is "merely negative" in its effect on the examiner's case.

The State claimed that defendant was driving at the time of a fatal accident, and "huffed" compressed air just before he lost control of the car. A sheriff's deputy testified that at the hospital after the accident, a back seat passenger said that just before the crash the passengers told defendant "you shouldn't be doing that." The witness testified that he did not remember making the alleged statement in the hospital.

The Appellate Court concluded that the witness's statement in the hospital was not admissible as impeachment, because there was no basis in the record to believe that the State's case was affirmatively damaged. However, the court also concluded that the improper impeachment constituted harmless error in view of the substantial evidence of guilt.

People v. Simpson, 2013 IL App (1st) 111914 Defense counsel was ineffective where he failed to object when the prosecution played a videotape in which a witness stated that defendant had confessed to the offense. The court noted that had an objection been raised, the recording would have been inadmissible.

First, because the witness did not affirmatively damage the State's case where he testified only that he could not recall what defendant had said, the videotape was inadmissible as impeachment. Second, the videotape was inadmissible under 725 ILCS 5/115-10.1, which authorizes the admission of a prior inconsistent statement which "narrates, describes, or explains an event or condition of which the witness had personal knowledge." In order for an out-of-court statement to satisfy the "personal knowledge" requirement, the witness must have actually seen the event which formed the subject matter of the statement. Here, the out-of-court statements were used as evidence that the defendant repeatedly struck the decedent with a bat. Because the witness admitted that he had no personal knowledge whether defendant struck the decedent and was merely repeating what he claimed defendant had said, the "personal knowledge" requirement was not satisfied.

Defendant's conviction for murder was reversed and the cause remanded for a new trial.

People v. Morris, 2013 IL App (1st) 110413 Before his trial for first degree murder, defendant successfully moved for suppression of a video statement which he made following his arrest. The suppression was based on a violation of **Miranda.** There was no allegation that the statement was involuntary.

In the suppressed confession, defendant admitted throwing a metal pole or dumbbell at the decedent. In addition, an eyewitness testified that he saw defendant throw the dumbbell, and a search of defendant's car after the offense disclosed a dumbbell.

The defendant filed a motion *in limine* asking that the trial court prohibit the State from introducing evidence of the confession as impeachment. Defense counsel stated that defendant would not testify, but that the defense would call as expert witnesses medical personnel who treated defendant at the Cook County Jail. The expert witnesses would testify that they diagnosed defendant with "Hill-Sachs deformity," a shoulder condition that would have prevented defendant from throwing the dumbbell.

The trial court denied the motion *in limine*. Although defense counsel represented in an offer of proof that the experts would testify that they based their diagnosis on physical observations of defendant and examination of x-rays rather than by relying on defendant's statements, the trial court ruled that the State could use the suppressed confession to impeach the experts concerning defendant's physical ability to throw a dumbbell. After the motion *in limine* was denied, the defendant elected not to call the experts to testify.

On appeal, defendant argued that the trial court erred by ruling that defendant's suppressed confession could be used to impeach expert defense witnesses concerning their diagnoses of defendant and their opinions of his ability to throw a dumbbell.

The court rejected the State's argument that the issue was not properly before the court because the defendant failed to call the experts after his motion *in limine* was denied. Under **Luce v. U.S.**, 469 U.S. 38 (1984) and its progeny, a defendant who fails to testify waives any issue concerning the denial of a motion *in limine* to bar use of his prior convictions as impeachment.

The court concluded that **Luce** does not apply here. First, the trial court made a definitive ruling that the expert witnesses could be impeached with defendant's statements, and the State made clear that it would impeach the experts if they testified. Second, the ruling did not turn on factual considerations, but involved a legal issue - whether an expert witness's testimony may be impeached with a defendant's suppressed statement. Third, the record was sufficient to permit the court to consider the issue. Under these circumstances, the issue was properly before the court although defendant did not call the experts to testify.

On the merits, the court concluded that the trial court abused its discretion by denying the motion *in limine*. An abuse of discretion occurs when the trial court's decision is arbitrary, fanciful, unreasonable, or would not be adopted by any reasonable person.

Under the exclusionary rule, evidence seized in violation of a defendant's constitutional rights is generally inadmissible at trial. However, an exception to the exclusionary rule permits the admission of illegally obtained evidence for the limited purpose of impeaching the credibility of the defendant's testimony at trial. In **James v. Illinois**, 493 U.S. 307 (1990), the U.S. Supreme Court declined to extend this exception to permit use of a defendant's suppressed statement to impeach the testimony of witnesses other than the defendant, finding that such use would not promote the truth-seeking function of a criminal trial and would significantly undermine the deterrent effect of the exclusionary rule. The **James** court also noted that the threat of being prosecuted for perjury is sufficient to deter false testimony by a witness who is not the accused, and that impeachment with a third party's statement is unnecessary. Furthermore, allowing impeachment of witnesses other than the accused with a suppressed statement might chill some defendants from presenting a defense through the testimony of others.

However, the court concluded that the error was harmless beyond a reasonable doubt because the defendant's offer of proof was weak, counsel never outlined exactly what the experts' opinions would be, and defendant was tried on an accountability theory under which he need not have thrown the dumbbell in order to be convicted. In addition, whether defendant threw the dumbbell was at best a minor part of the State's case, and three eyewitnesses identified defendant as participating in the offense. Under these circumstances, defendant would have been found guilty beyond a reasonable doubt even had the medical experts testified that he was unable to throw the dumbbell.

People v. Wilson, 2012 IL App (1st) 101038 In audiotaped and written statements to police, defendant's uncle recounted statements which defendant made about an incident which led

to first degree murder and armed robbery charges against the defendant. At trial, the uncle claimed that he did not remember his statements. The State then sought to admit the uncle's audio taped and written statements as substantive evidence.

Under 725 ILCS 5/115-10.1, a prior inconsistent statement may be offered as substantive evidence if several requirements are met, including that the witness is subject to cross-examination, the statement narrates or describes an event "of which the witness had personal knowledge," and the statement: (1) was written or signed by the witness, (2) acknowledged by the witness under oath at a trial or hearing, or (3) accurately recorded electronically. The court rejected the State's argument that the "personal knowledge" requirement is satisfied where the witness has personal knowledge that the declarant made the hearsay statement which is sought to be admitted, but lacks personal knowledge of the event described in that statement.

The court found three reasons to reject the State's position. First, precedent based on an "unusually detailed legislative history" establishes that the General Assembly intended to require personal knowledge of the underlying event, and not mere knowledge that the declarant made a hearsay statement.

Second, the personal knowledge requirement assures that the statement is reliable by affording the defendant an adequate opportunity for cross-examination and because it is less likely that a witness with personal knowledge of the underlying event will repeat a statement that he knows to be untrue. Construing the personal knowledge requirement to apply only to the making of the statement would undermine both factors, because the opportunity for effective cross-examination would be compromised and because the witness would have no independent knowledge whether the statement is true.

Finally, the State's interpretation of the personal knowledge requirement would render that requirement meaningless, because a witness who testifies about a hearsay statement necessarily has knowledge that the statement was made.

Thus, the trial court erred by admitting the portions of the uncle's audio taped and written statements recounting defendant's hearsay statements, because the uncle had no personal knowledge of the incident other than what the defendant stated.

The court rejected the State's argument that even if the prior inconsistent statements were not admissible substantively, they should have been admitted as impeachment. Although prior inconsistent statements may be admitted as impeachment, the State may impeach its own witness only if the witness's testimony affirmatively damaged the State's case. To be subject to impeachment, the testimony must do more than merely disappoint the State by failing to incriminate the defendant. Instead, the testimony must give "positive aid" to the defense.

The mere fact that a witness claims a lack of memory does not affirmatively damage the State's case. Thus, impeachment was not justified by the uncle's claim that he could not remember the statements.

The court acknowledged that the State's case is damaged by a witness's claim that someone other than the defendant committed the offense. Where the witness was not "seriously" confessing to having committed the offense, however, and was simply trying to avoid testifying against the defendant, no damage was done to the State's case. Thus, impeachment was not justified.

People v. Gray, 406 Ill.App.3d 466, 941 N.E.2d 338 (1st Dist. 2010) A guilty plea is an admission to the elements of the charged offense. It does not constitute an admission to collateral matters.

A defense witness pled guilty to illegal possession of a weapon, a charge related to the first degree murder and aggravated battery charges for which defendant was tried. The factual basis presented by the prosecutor at the plea hearing included a statement that the witness had given the gun to the defendant and the defendant had fired shots that resulted in the death of the murder victim. After the witness testified at defendant's trial that defendant had not been the shooter, the prosecutor introduced the factual basis for the plea to impeach the testimony of the witness.

By pleading guilty to the gun charge, the witness admitted that she possessed a gun illegally. Her plea was not an admission that she gave the gun to the defendant or that he fired the gun, because those collateral facts had no bearing on the elements that the State had to prove to establish her guilt of the weapons offense. Neither at the time of the plea nor at the time of defendant's trial did the witness assent to the collateral matters presented by the prosecutor in the factual basis for the plea. Therefore, the factual basis did not constitute a judicial admission or a prior inconsistent statement that could be used to impeach the testimony of the witness.

People v. Robinson, 368 Ill.App.3d 963, 859 N.E.2d 232 (1st Dist. 2006) A criminal defendant is entitled to impeach witnesses on matters that are not collateral. Thus, the trial court erred by refusing to allow the defendant to cross-examine the arresting officer on prior inconsistent testimony to the grand jury.

People v. Eggert, 324 Ill.App.3d 79, 754 N.E.2d 474 (2d Dist. 2001) IPI Crim. 4th No. 3.11, which instructs the jury concerning impeachment by prior inconsistent statements, is properly given where the inconsistency between statements arises from omissions as well as where there are directly conflicting statements. The trial court abused its discretion by failing to give IPI No. 3.11 where the arresting officer's written police report failed to mention two items about which he testified - that defendant was weaving across lanes of traffic and refused to take field sobriety tests.

People v. Hood, 229 Ill.App.3d 202, 593 N.E.2d 805 (1st Dist. 1992) Reversible error occurred where the State attempted to impeach an eyewitness with a police report that was not a substantially verbatim account of her statement.

People v. Coleman, 205 Ill.App.3d 567, 563 N.E.2d 1010 (4th Dist. 1990) Where a State witness testified about certain statements made by the sex offense complainant, and such statements were admitted as substantive evidence, the defendant should have been allowed to question the witness about subsequent, inconsistent statements by the same complainant. Because the victim-declarant "is, in essence, allowed to testify through her earlier out-of-court statement, it is only appropriate [to allow] 'impeachment' of this 'testimony' by" inconsistent out-of-court statements which she made. The court added:

> "Of course, as the trial court indicated, once defendant is allowed to show inconsistencies in the subsequent statement, the State is allowed to present evidence of the rest of the statement to show that it is not, in fact, inconsistent. However, the determination of whether it is inconsistent, what weight to give it, and how it would impact the earlier statement are all appropriately left to the trier of fact."

People v. Manning, 185 Ill.App.3d 597, 541 N.E.2d 797 (3d Dist. 1989) A prior statement may be introduced as impeachment only after a proper foundation is laid by confronting the defendant with the time, place and circumstances of the prior statements and allowing him to admit or deny making the statements. This the State failed to do; "[a]lthough the defendant was asked a few general questions about what he told the police on cross-examination, he was not confronted with the prior statement and given the opportunity to admit or deny making the allegedly inconsistent statement."

For prior statements to be properly used as impeachment, the statements "must be materially inconsistent with and tend to discredit the witness' testimony." Here, the answers defendant gave in his prior statement were not materially inconsistent with his trial testimony.

Finally, in closing argument the prosecutor improperly asked the jury to consider the defendant's prior statement as substantive evidence.

People v. Johnson, 138 Ill.App.3d 980, 486 N.E.2d 433 (5th Dist. 1985) Under People v. Weaver, 92 Ill.2d 545, 442 N.E.2d 255 (1982), a party may not impeach its own witness by prior inconsistent statements unless the witness's testimony has damaged, rather than merely failed to support, the position of the impeaching party. "The reason for this is simple: No possible reason exists to impeach a witness who has not contradicted any of the impeaching party's evidence, except to bring inadmissible hearsay to the attention of the jury." See also, **People v. McMurtry**, 279 Ill.App.3d 865, 665 N.E.2d 450 (1st Dist. 1996) (error to allow State to impeach its own witness; testimony in question actually favored the State and did not damage its case; plain error rule applied because error "surely" could have affected outcome of case); **People v. Miller**, 302 Ill.App.3d 487, 706 N.E.2d 947 (1st Dist. 1998) (under Supreme Court Rule 238(a), a party may impeach its own witness with a prior inconsistent statement only if the witness's testimony has damaged that party's case; impeachment is improper where testimony merely fails to support the case of the party that called the witness); **People v. Moore**, 301 Ill.App.3d 728, 704 N.E.2d 80 (3d Dist. 1998) (to impeach a witness with a prior inconsistent statement, the impeaching party must confront the witness with the place, circumstances and substance of the earlier statement and allow her an opportunity to explain the inconsistency; although the Federal Rules of Evidence permit a witness to be recalled to explain the inconsistency after extrinsic evidence of the prior inconsistent statement has been introduced, Illinois law requires that the impeaching party establish an adequate foundation before attempting to introduce the inconsistent statement)

People v. Smith, 127 Ill.App.3d 622, 469 N.E.2d 634 (1st Dist. 1984) Where the State introduced spontaneous declarations of one of the stabbing victims, who was deceased at the time of trial, the defense should have been allowed to present the contrary statement of the deceased. "Where a statement of an absent declarant is properly admitted into evidence under one of the hearsay exceptions, the opposing party may impeach such statement with a prior inconsistent statement by the [same] declarant."

People v. Suerth, 97 Ill.App.3d 1005, 423 N.E.2d 1185 (1st Dist. 1981) Where defense counsel was not aware of the prior statement when he cross-examined the declarant, he should have been allowed to recall the witness in order to lay a foundation so a police officer could testify to the statement.

People v. Glass, 94 Ill.App.3d 69, 418 N.E.2d 454 (2d Dist. 1981) The State erred by using a defense witness's post-arrest silence to impeach him. Although the use of a witness's post-arrest silence does not involve constitutional considerations, as does use of the defendant's post-arrest silence (see **Doyle v. Ohio**, 426 U.S. 610 (1976)), the witness's post-arrest silence was not sufficiently inconsistent with the trial testimony to warrant admission as impeachment. Because the defense witness had been advised by his attorney not to talk to the police after his arrest, his silence was "insolubly ambiguous." See also, **People v. Homes**, 274 Ill.App.3d 612, 654 N.E.2d 662 (1st Dist. 1995) (plain error to impeach witness with post-arrest silence; State could not establish "threshold inconsistency" where there were many reasons, including possible reliance on constitutional rights, why the witness might not have spoken).

People v. Currie, 84 Ill.App.3d 1056, 405 N.E.2d 1142 (1st Dist. 1980) A police officer may not be impeached by the contents of a police report that he did not prepare or sign.

People v. Hanson, 83 Ill.App.3d 1108, 404 N.E.2d 801 (2d Dist. 1980) The trial court erred by prohibiting the defendant from attempting to rehabilitate a witness after the witness had been impeached with the fact that she lied to the police. It is "well settled" that a witness who is impeached with a prior inconsistent statement is allowed to explain the inconsistency

People v. Vinson, 90 Ill.App.3d 6, 412 N.E.2d 1062 (3d Dist. 1980) It was improper for the State to lay a foundation for impeachment and then fail to produce any evidence of the alleged impeaching statements. Because the error was not harmless, the cause was reversed and remanded for a new trial.

People v. McIntosh, 70 Ill.App.3d 188, 388 N.E.2d 142 (1st Dist. 1979) A proper foundation for impeachment is typically laid by directing the witness's attention to the time, place, substance and recipient of the statement. However, a proper foundation may be laid, without confronting the witness with the contents of his prior statement, when the witness denies having any conversation with the person to whom the statement was allegedly made or about the subject matter involved.

People v. Lewis, 75 Ill.App.3d 259, 393 N.E.2d 1098 (1st Dist. 1979) No sufficient foundation was laid where witness did not deny the prior statement, but only stated that it did not sound like his statement, and was not given an opportunity to explain.

§19-15(b)
As Substantive Evidence

Illinois Supreme Court
People v. Bush, 2023 IL 128747 Defendant and his cousin, Mayfield, were involved in a neighborhood dispute which intensified over the course of a single day. The dispute culminated in a physical confrontation between two groups of individuals, ending with defendant's firing the shots that killed one man and injured another. Defendant claimed that he shot in self-defense, fearing for his safety and the safety of others. Ultimately, defendant was convicted of felony murder predicated on mob action, aggravated battery with a firearm, and unlawful possession of a weapon by a felon.

The appellate court reversed defendant's conviction of aggravated battery with a firearm but otherwise affirmed. In the Supreme Court, defendant argued that the trial court erred in refusing to admit a State witness's rap video as a prior inconsistent statement at trial. Under 725 ILCS 5/115-10.1, a prior inconsistent statement may be admitted substantively if it meets certain requirements specified in the statute, specifically that it narrates, describes, or explains an event of which the witness had personal knowledge and that it was accurately recorded by video, audio, or other similar electronic means. Those requirements were met here, but the trial court reasoned that the rap video was made for entertainment purposes and thus was not akin to a prior witness statement and was therefore inadmissible. The Supreme Court concluded that the trial court abused its discretion in excluding the video.

Once a statement satisfies the requirements of Section 115-10.1, it is admissible so long as it is relevant. Here, the statements on the video bore a "strong nexus" to the circumstances of the underlying offense in that the rap purported to narrate the events of that day, thus it was relevant as a statement of historical fact. But, the error in excluding the video was harmless beyond a reasonable doubt because it was cumulative to other evidence introduced at trial.

People v. Simpson, 2015 IL 116512 Generally, out-of-court hearsay is inadmissible as substantive evidence. Under 725 ILCS 5/115–10.1, however, a prior inconsistent statement may be admitted substantively if it "narrates, describes, or explains an event or condition of which the witness had personal knowledge," and the declarant is subject to cross-examination concerning the statement.

The court concluded that the "personal knowledge" provision requires that the witness had personal knowledge of the events described in the prior inconsistent statement. The court rejected the State's argument that §115–10.1 is satisfied where the witness merely heard a statement about an event that he did not witness.

Here, the witness told police that defendant admitted striking the decedent several times with a baseball bat. At trial, however, the witness said that he had no recollection of making such a statement. The court concluded that the State could introduce a videotape of the witness making the prior statement only if it could show that the witness had personal knowledge of the actual incident and not just that defendant had made the statement. Because the State lacked such evidence, the prior statement was inadmissible.

People v. Redd, 135 Ill.2d 252, 553 N.E.2d 316 (1990) A witness's assertion of the Fifth Amendment privilege is not inconsistent with prior out-of-court statements, and thus does not satisfy the inconsistency requirement of §115-10.1(a). The Court rejected the State's contention that the assertion of the Fifth Amendment privilege should be treated as a "memory loss" for purposes of §115-10.1(a). When a witness asserts the privilege, "he is not claiming to be unable to recollect prior affirmations of asserted facts" or asserting "a gap in his recollection"; rather, he is only asserting that "the answers to questions posed may tend to incriminate him." See also, **People v. Cooper**, 210 Ill.App.3d 427, 569 N.E.2d 144 (1st Dist. 1991) (prior statements or grand jury testimony are admissible as substantive evidence under §115-10.1 if inconsistent with the declarant's trial testimony, but a refusal to testify on Fifth Amendment grounds, even if invalid, is not inconsistent with prior statements). Compare, **People v. Lee**, 243 Ill.App.3d 745, 612 N.E.2d 922 (3d Dist. 1993) (witness's "alleged memory loss" and refusal to answer questions was not tantamount to an assertion of Fifth Amendment rights; witness did not explicitly exercise his Fifth Amendment rights,

and never suggested that his refusal to answer was based on a fear of self-incrimination; furthermore, the pretrial statement contained no incriminating statements).

In addition, the witness's assertion of his Fifth Amendment privilege "prevented defendant an opportunity to cross-examine [him] in any meaningful manner," as is required by §115-10.1.

The State contended that because the witness asserted his Fifth Amendment privilege, he was "unavailable" as a witness, making his grand jury testimony admissible under the "residual exception" to the hearsay rule in Federal Rule of Evidence 804(b)(5) (for hearsay statements that contain "circumstantial guarantees of trust worthiness"). The Supreme Court rejected this contention. "We decline to adopt the residual exception to the hearsay rule set out in Rule 804(b)(5)." "If a prior inconsistent statement is to be admitted in Illinois in a criminal trial as substantive evidence against a defendant, the statement must meet the requirements set out by the General Assembly in section 115-10.1." See also, **People v. Olinger**, 176 Ill.2d 326, 680 N.E.2d 321 (1997) (Illinois does not recognize the residual hearsay exception).

People v. Flores, 128 Ill.2d 66, 538 N.E.2d 481 (1989) The State was properly allowed to introduce the grand jury testimony of its witness as substantive evidence under §115-10.1, although at trial the witness claimed he did not remember the prior testimony. See also, **People v. Young**, 170 Ill.App.3d 969, 524 N.E.2d 982 (1st Dist. 1988) (prior inconsistent statement was admissible under §115-10.1 though the witness denied making the statement). Compare, **People v. Yarbrough**, 166 Ill.App.3d 825, 520 N.E.2d 1116 (5th Dist. 1988) (prior statement not admissible under §115-10.1 where the witness did not remember making the statement)

People v. Orange, 121 Ill.2d 364, 521 N.E.2d 69 (1988) 725 ILCS 5/115-10.1, which authorizes the admission of prior statements that are inconsistent with a witness's testimony at trial so long as the witness is subject to cross-examination and made or acknowledged the prior statement under oath, does not violate the separation of powers doctrine. The legislature has the "power to prescribe new and alter existing rules of evidence or to prescribe methods of proof"; the fact that the Court has previously refused to allow the substantive use of prior inconsistent statements did not preclude the legislature from doing so.

A prior statement that is consistent with a witness's trial testimony, but inconsistent with a prior statement introduced under §115-10.1, is not admissible. "To be admissible as substantive evidence under [§115-10.1], the prior statement must be inconsistent with the witness' trial testimony."

Illinois Appellate Court

People v. Thornton, 2024 IL App (4th) 220798 The trial court did not err when it admitted social media messages and a prior inconsistent statement at defendant's murder trial. The messages showed defendant arguing with a member of the deceased's gang before the shooting, suggesting a motive. While defendant argued that this theory was too speculative, such that the prejudicial effect substantially outweighed any probative value, the appellate court disagreed. The conversation was three weeks before the shooting and showed the escalation of threats between the rival gangs. It was therefore relevant to show the beginning of a sequence of events that established defendant's motive for killing the deceased.

The court also properly admitted the prior inconsistent statements of a State witness. Defendant argued that the State failed to establish the "personal knowledge" requirement of section 115-10.1(c)(2), because in the prior statement, the witness stated that he saw

defendant leave the car just before defendant shot the victim, but he did not say he actually witnessed the shooting. The appellate court held that this argument misconstrues the "personal knowledge" requirement – the knowledge refers to the events described in the prior statement. There is no requirement that the witness must have personal knowledge about all aspects of the crime. Rather, the statement cannot derive from information obtained from a third party. Because Davis's prior statement stated that he actually witnessed defendant leave the car, and implied that he saw defendant shoot the victim, the statement met the requirements of section 115-10.1(c)(2).

A special concurrence noted that, had the officers and State obtained the witness' prior statement under oath, the "personal knowledge" requirement would not have even come into play. See 725 ILCS 5/115-10.1(c)(1). This justice suggested the police and State should take witness statements before a grand jury or at a judicial hearing, such as a request for an arrest warrant. The justice described his own personal experience of driving to meet a witness and two police officers in a parking lot, entering the squad car, swearing in the witness, and taking the statement under oath before issuing an arrest warrant. Such a statement could be admitted at trial if inconsistent with the witness' trial testimony.

People v. Mays, 2023 IL App (4th) 210612 Under section 115-10.1, a prior inconsistent statement may be admitted if it "narrates, describes, or explains an event or condition of which the witness had personal knowledge." Here, the statement in question concerned defendant's relationship with the murder victim. In the prior statement, the witness told police that defendant complained the victim was flaunting money and calling defendant a "bitch." Defendant argued on appeal that this statement did not narrate an event about which the witness had personal knowledge. Rather, the information about the relationship was relayed second-hand. The appellate court disagreed. The witness had personal knowledge of conversations he had with defendant, and his prior statements described those conversation.

Additionally, the State did not need to specifically ask about the witness's knowledge of the relationship before introducing the statement. Once the witness denied or failed to recall talking to the police about any conversation with the defendant, the prior statements became inconsistent and admissible. Even if a more complete foundation should have been laid, defendant did not object and therefore deprived the State of the opportunity to correct the deficiency at the trial level.

People v. Brock, 2022 IL App (3d) 200430 Defendant argued that he was denied his right to present a complete defense where he was prohibited from playing an eyewitness's videotaped statement to the police. During cross-examination, defense counsel questioned the witness about her statement, in particular the parts of her statement which included a physical description of the shooter which was contrary to her trial testimony and inconsistent with defendant's physical appearance. Counsel also elicited testimony from the police as to the witness's statement describing the shooter. And, defense counsel referenced the inconsistencies in closing arguments.

The appellate court majority concluded that the trial court did not abuse its discretion. While the witness's videotaped statement was admissible as substantive evidence under 725 ILCS 5/115-10.1, the judge retains the discretion to exclude statements and did so here because the recording was cumulative. The appellate court acknowledged that the prior inconsistent statements were central to the defense, but the court concluded that exclusion of the video recording did not meaningfully interfere with defendant's right to present a complete defense. The jury was well-aware of her varying statements, and the court was not required to allow the defense to introduce cumulative evidence.

Further, any error was harmless where the evidence of defendant's guilt was overwhelming. Defendant was recorded admitting to, and bragging about, having committed the shooting. Another witness testified that defendant was at the party where the shooting occurred, with a gun in his waistband. And, multiple witnesses testified that defendant confessed he was the shooter during additional conversations after the incident. The dissenting justice would have found that the trial court abused its discretion in refusing to admit the video recording, but agreed that the error was harmless. Defendant's convictions were affirmed.

People v. Guerrero, 2021 IL App (2d) 190364 The trial court erred in admitting the prior inconsistent statement of a State witness at defendant's aggravated battery trial. The State alleged that defendant threw a rock at the victim, Perez, and that Perez's companion, Beltran, witnessed the crime. On the stand, Beltran denied any knowledge of the crime. The State sought to introduce his prior statement under section 115-10.1. Because the statement was not recorded, it was admissible only if the State could prove, inter alia, that the statement was based on Beltran's personal knowledge of the events described, and that Beltran acknowledged under oath the making of the statement.

Although defendant did not contemporaneously object to the introduction of this evidence, the State did not raise forfeiture on appeal. Thus, the Appellate Court reviewed defendant's argument on the merits.

To prove the personal knowledge requirement, Beltran did not have to testify that he witnessed the events. Rather, the question is resolved by looking at the face of the prior statement. Here, the State adequately proved the personal knowledge requirement, because the prior statement contained Beltran's assertion that he personally observed the aggravated battery.

The State did not prove the acknowledgment requirement. Beltran testified he spoke with the police, but under section 115-10.1, the witness must acknowledge making the specific statement the State seeks to admit. Here, Beltran denied making the statements at issue. The trial court abused its discretion in finding Beltran's general acknowledgment of a conversation with police satisfied section 115-10.1.

Defendant also challenged the admission of Beltran's prior identification of defendant in a photo array. Defendant alleged that Beltran did not "perceive" defendant as required by section 115-12, because, although he admitted to making the identification, he denied witnessing the crime. The Appellate Court rejected the argument. Section 115-12 does not require the witness to admit he perceived the defendant committing the crime, only that he had personally perceived him in the past.

However, the trial court did err when it allowed the detective to testify that Beltran identified defendant as the person he saw committing an aggravated battery. This allowed the State to admit under section 115-12 what it could not properly admit under section 115-10.1. The detective should only have been allowed to testify that Beltran identified the person in the photo as defendant.

These errors were not harmless. Although the State had properly admitted Perez's prior inconsistent statement identifying defendant as his attacker, Perez was a convicted felon with a "drug problem" who denied making the statement at trial. And while defendant conceded that Beltran's prior inconsistent statement could have been admitted as impeachment even if not admitted substantively, the Appellate Court rejected this concession where Beltran was the State's witness and did not affirmatively damage the State's case, meaning the State could not impeach him. Finally, Beltran's statement corroborated Perez's prior statement, amplifying and providing credibility to that evidence. Thus, there was a

reasonable likelihood of a different result at trial had Beltran's prior statement been properly excluded.

People v. Gladney, 2020 IL App (3d) 180087 Officers investigating an assault ordered three suspects to the ground and searched them. On one of the suspects, the officers found a bag of drugs. While testifying about his recovery of the bag, the officer stated that "other officers observed [defendant] passing" this bag to the suspect. A defense objection on hearsay grounds was overruled.

When the suspect with the bag took the stand, he stated that defendant passed him a cell phone, not a bag of drugs. Over defense objection, he admitted that, at the scene, he told the officer that defendant passed him that bag. He testified that this was untrue, and that he only stated so because he was scared. The State called an officer who heard the suspect's statement at the scene, and this officer testified, over objection to hearsay, that the suspect admitted defendant passed him the bag of drugs. The post-trial motion did not complain of the hearsay rulings.

The Appellate Court agreed with defendant that the first statement was hearsay, because it relayed the statements of the other officers in an attempt to prove the truth of the matter – that defendant possessed the drugs. But, the error was forfeited, and the evidence of defendant's possession was not closely balanced, as other officers witnessed the transaction and no cell phone was found on the other suspect. As for the suspect's statement at the scene, the court found no hearsay problem, as it met both the personal knowledge and acknowledgment requirements of Rule 801(d)(1)(A)(2)(b). Moreover, the statement was admissible as impeachment.

People v. Wesley, 2019 IL App (1st) 170442 The "personal knowledge" requirement for the substantive admission of prior inconsistent statements does not apply to prior sworn testimony. 725 ILCS 5/115-10.1(c)(1), (2). Thus, prior grand jury testimony inconsistent with trial testimony is substantively admissible even if the testimony describes a defendant's admission to a crime about which the witness lacks personal knowledge. Illinois Rule of Evidence 602, which requires personal knowledge for witness testimony, does not alter this law. Rule 602 is satisfied if the witness has personal knowledge of the defendant's admission, not the underlying offense.

People v. Murphy, 2019 IL App (4th) 170646 To be considered as substantive evidence under 725 ILCS 5/115-10.1(b) , a party must confront the witness with the prior testimony, and the transcript of the prior testimony must be admitted into evidence. The party does not then have to publish the prior testimony to the jury, as the jury will have already heard the testimony during questioning. The court rejected the defense argument that there is a distinction between admitting evidence to the court and presenting that evidence to the jury.

People v. Lewis, 2017 IL App (4th) 150124 Defendant was convicted of aggravated battery based on choking a woman. At trial, a defense witness testified that she saw defendant and the woman swatting and pushing each other and she got between them to stop the fight, but she never saw defendant choke the woman. During cross, she testified that she spoke to a police officer about the incident, but did not remember telling him that defendant choked the woman twice. In rebuttal, the officer testified about everything the defense witness told him, including that defendant "grabbed" the woman twice around the neck.

On appeal, defendant argued that the State improperly introduced the witness's prior inconsistent statement as substantive evidence under 725 ILCS 5/115-10.1. The court

rejected this argument holding that the evidence was never admitted as substantive evidence. Section 115-10.1 applies to "turncoat witnesses," when a party calls a witness who disowns a prior statement by testifying differently on the stand. Here, the witness testified as a defense witness and the State was only trying to impeach her on cross-examination with a prior inconsistent statement and then completing that impeachment by calling the officer who heard the statement. Nothing about this constituted using the prior statements as substantive evidence.

The court nevertheless found that the method the State used to impeach the witness was incorrect. The State should have directly asked the officer through leading questions whether the witness told him that defendant choked the witness twice. That would have allowed the officer to perfect the impeachment (or not) by simply answering yes or no. Instead, the State asked the officer an open-ended non-leading question about whether he recalled what the witness told him. That allowed the officer to improperly testify about everything the witness said instead of focusing on the impeaching portion of her statements. And it allowed the officer to use the ambiguous word "grabbed" instead of merely affirming or denying if the witness said "choked."

People v. Brothers, 2015 IL App (4th) 130644 Under 725 ILCS 5/115-10.1(c)(2), a prior consistent statement is admissible as substantive evidence only if narrates, describes, or explains an event that the witness has personal knowledge of, and (A) the statement has been written or signed by the witness; (B) the witness acknowledged making the statement under oath at a hearing or trial where a party wants to introduce the statement; or (C) the statement has been accurately recorded.

Before a prior inconsistent statement may be admitted under subsection (B), the proponent must lay a proper foundation by conducting an "acknowledgment hearing" outside the presence of the jury, where the witness is presented with the prior consistent statement and given an opportunity to acknowledge under oath that she made it. If the witness acknowledges making the statement, it is admissible as substantive evidence; otherwise it is inadmissible.

Here the State merely asked the witness whether she had talked to police officers about the incident. The State never asked the witness to acknowledge under oath that she had made any specific statement. The Appellate Court held that although the witness acknowledged talking to police officers about the incident, "her testimony came nowhere close to" laying a proper foundation for admission of the prior inconsistent statements as substantive evidence. Their admission was thus error.

Since the prior statements were the only evidence presented regarding one of defendant's convictions (for aggravated criminal sexual assault), the court remanded for a new trial on that count. The court however found that the remaining evidence was overwhelming on the other counts, and thus affirmed those convictions.

People v. Wiggins & Swift, 2015 IL App (1st) 133033 Under 725 ILCS 5/115-10.1, only those portions of a prior statement that are actually inconsistent are admissible. Here, the trial judge erred by permitting the prosecution to read to the jury all of a prior statement where only a portion of that statement was inconsistent with the declarant's testimony at trial.

The court concluded that the cumulative effect of several errors, including the improper admission of a prior inconsistent statement, denied a fair trial. The conviction was reversed and the cause remanded for a new trial.

People v. Hobson, 2014 IL App (1st) 110585 725 ILCS 5/115-10.1(c)(2) provides that a prior inconsistent statement that was not made under oath in a legal proceeding constitutes hearsay, and is inadmissible as substantive evidence unless it describes an event or condition of which the declarant had personal knowledge. Where neither of two witnesses whose statements were introduced by the State had seen the shooting in question, they lacked the personal knowledge required to allow substantive use of their prior statements that they had overheard statements about the shooting. The court rejected the State's argument that Illinois courts have misinterpreted §115-10.1(c)(2) by requiring personal knowledge of the actual event in question, and not merely personal knowledge that defendant and others made statements about the shooting. The court noted that the State's theory would render the personal knowledge requirement superfluous, because in any event one cannot testify about a hearsay statement that he did not personally witness.

People v. Simpson, 2013 IL App (1st) 111914 The court concluded that defense counsel was ineffective where he failed to object when the prosecution played a videotape in which a witness stated that defendant had confessed to the offense. The court noted that had an objection been raised, the recording would have been inadmissible.

First, because the witness did not affirmatively damage the State's case where he testified only that he could not recall what defendant had said, the videotape was inadmissible as impeachment. Second, the videotape was inadmissible under 725 ILCS 5/115-10.1, which authorizes the admission of a prior inconsistent statement which "narrates, describes, or explains an event or condition of which the witness had personal knowledge." In order for an out-of-court statement to satisfy the "personal knowledge" requirement, the witness must have actually seen the event which formed the subject matter of the statement. Here, the out-of-court statements were used as evidence that the defendant repeatedly struck the decedent with a bat. Because the witness admitted that he had no personal knowledge whether defendant struck the decedent and was merely repeating what he claimed defendant had said, the "personal knowledge" requirement was not satisfied.

Defendant's conviction for murder was reversed and the cause remanded for a new trial.

People v. Sykes, 2012 IL App (4th) 100769 A prior statement of a witness is admissible as substantive evidence if: (a) it is inconsistent with his testimony at trial, (b) the witness is subject to cross-examination concerning the statement, and (c) the statement either: (1) is made under oath at a trial, hearing or other proceeding, or (2) narrates, describes or explains an event or condition of which the witness had personal knowledge, and A) the statement is proved to have been written or signed by the witness, or B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission of the statement is sought, or at a trial, hearing or other proceeding, or C) the statement is proved to have been accurately recorded by a tape recorder, video recorder, or similar electronic means of sound recording. 725 ILCS 5/115-10.1.

The term "acknowledged" in the statute is not a term of art, having only one precise meaning. Whether a witness's testimony constitutes an acknowledgment of the prior statement within the meaning of the statute is a matter left to the trial court's sound discretion.

The trial court did not abuse its discretion in implicitly finding that two prosecution witnesses acknowledged the making of their prior statements. One witness acknowledged the statement by responding, "No, that would not be inaccurate," when asked if it would be inaccurate if a police officer wrote down that she testified that it was defendant Sykes raising

his arms and firing four shots in the air, even though when the prosecutor asked the follow-up question, "So that would be what you told that officer?" she responded, "Probably. I don't remember what happened that night."

The second witness acknowledged her prior statement when she answered, "Yes," to the question, "If a police officer put in his report that you witnessed Sykes raise one of his arms and fire approximately four shots, would that be true?" The witness also immediately clarified that she did not say that it was defendant when the prosecutor followed up with the question, "So that's what you told the officer?"

Once the statutory threshold for admissibility under §115-10.1(c)(2)(B) was crossed, everything else that followed – namely, the attempts by the witnesses to disavow their prior inconsistent statements – was surplusage and utterly without effect regarding the admissibility of those prior statements as substantive evidence. The disavowals by the witnesses of their prior statements simply constituted a matter for the trier of fact to consider when deciding which statements of the witnesses, if any, were credible.

Turner, J., specially concurring, concluded that with respect to the second witness, the complete context of her answers did not show an acknowledgment of the prior statement. In his view, "the majority's loose interpretation of what constitutes an acknowledgment is incongruous with the reliability safeguards the statute incorporates." However, he agreed that defendant's conviction should be affirmed because the evidence was not so closely balanced that the error alone threatened to tip the scales of justice against defendant.

People v. Vannote, 2012 IL App (4th) 100798 The child witness against the defendant testified that he could not recall what occurred on the date of the alleged offense. His statement recorded the day after the incident was thus inconsistent with his trial testimony and admissible pursuant to §115-10.1.

Although 31 to 35 seconds of the 12-minute recording were missing, the missing portion was at the beginning of the interview when background questions were asked. The statements made by the witness at the beginning of the recording were repeated, and similar statements were made in response to non-leading questions during the remainder of the interview. Another witness also corroborated the statements. Therefore, the unrecorded portions of the statement were not so substantial as to render the recording untrustworthy as a whole.

No confrontation-clause problem exists simply because a witness's memory precludes him from being cross-examined to the extent the examiner would have liked. Because the witness was available for cross-examination and was cross-examined, there was no violation of defendant's constitutional right to confrontation despite the witness's claim of no memory of the events.

Cook, J., dissented.

The recorded statement of the child witness was testimonial evidence and inadmissible due to the absence of an opportunity to cross-examine. Although a gap in the recollection of a witness does not necessarily preclude the opportunity for effective cross-examination, there was more than a gap here. The witness had no recollection of the events or of the recorded examination. Unlike an adult witness who can be discredited by his lack of memory, a child's inability to remember does not discredit the witness. Due to normal developmental limitations, child witnesses are susceptible to forgetting details when there is substantial delay between the event and the request to recall it at trial. The State was able to take advantage of the witness's inability to recall by portraying him to the jury as emotionally distraught. Although the witness was able to answer "yes" or "no" to questions by the defense, a jury may conclude in such circumstances that the answers are those of the

interrogator, and the prosecutor argued to the jury that the witness's answers on cross-examination were in fact worthless.

The recorded statement was also inadmissible because it was not proved to have been accurately recorded. The recording device had a known malfunction that had caused it to skip on previous recordings. The most important part of the interview, which preceded the witness's statement that defendant touched him, was missing, providing no answers to the question of whether the examination was leading or open-ended.

People v. Wilson, 2012 IL App (1st) 101038 In audio taped and written statements to police, defendant's uncle recounted statements which defendant made about an incident which led to first degree murder and armed robbery charges against the defendant. At trial, the uncle claimed that he did not remember his statements. The State then sought to admit the uncle's audio taped and written statements as substantive evidence.

Under 725 ILCS 5/115-10.1, a prior inconsistent statement may be offered as substantive evidence if several requirements are met, including that the witness is subject to cross-examination, the statement narrates or describes an event "of which the witness had personal knowledge," and the statement: (1) was written or signed by the witness, (2) acknowledged by the witness under oath at a trial or hearing, or (3) accurately recorded electronically. The court rejected the State's argument that the "personal knowledge" requirement is satisfied where the witness has personal knowledge that the declarant made the hearsay statement which is sought to be admitted, but lacks personal knowledge of the event described in that statement.

The court found three reasons to reject the State's position. First, precedent based on an "unusually detailed legislative history" establishes that the General Assembly intended to require personal knowledge of the underlying event, and not mere knowledge that the declarant made a hearsay statement.

Second, the personal knowledge requirement assures that the statement is reliable by affording the defendant an adequate opportunity for cross-examination and because it is less likely that a witness with personal knowledge of the underlying event will repeat a statement that he knows to be untrue. Construing the personal knowledge requirement to apply only to the making of the statement would undermine both factors, because the opportunity for effective cross-examination would be compromised and because the witness would have no independent knowledge whether the statement is true.

Finally, the State's interpretation of the personal knowledge requirement would render that requirement meaningless, because a witness who testifies about a hearsay statement necessarily has knowledge that the statement was made.

Thus, the trial court erred by admitting the portions of the uncle's audio taped and written statements recounting defendant's hearsay statements, because the uncle had no personal knowledge of the incident other than what the defendant stated.

The court rejected the State's argument that even if the prior inconsistent statements were not admissible substantively, they should have been admitted as impeachment. Although prior inconsistent statements may be admitted as impeachment, the State may impeach its own witness only if the witness's testimony affirmatively damaged the State's case. To be subject to impeachment, the testimony must do more than merely disappoint the State by failing to incriminate the defendant. Instead, the testimony must give "positive aid" to the defense.

The mere fact that a witness claims a lack of memory does not affirmatively damage the State's case. Thus, impeachment was not justified by the uncle's claim that he could not remember the statements.

The court acknowledged that the State's case is damaged by a witness's claim that someone other than the defendant committed the offense. Where the witness was not "seriously" confessing to having committed the offense, however, and was simply trying to avoid testifying against the defendant, no damage was done to the State's case. Thus, impeachment was not justified.

People v. Santiago, 409 Ill.App.3d 927, 949 N.E.2d 290 (1st Dist. 2011) Just as evidence of a co-defendant's confession is inadmissible as evidence of defendant's guilt, evidence that a co-defendant pleaded guilty or was convicted is inadmissible as evidence of defendant's guilt. A defendant is entitled to have his guilt or innocence determined based on the evidence against him without being prejudged according to what has happened to another. **People v. Sullivan**, 72 Ill.2d 36, 377 N.E.2d 17 (1978).

The court held that this rule was not violated where the prosecutor elicited from the co-defendants that they had pleaded guilty, but in the context of admitting statements that they had made at their plea hearings acknowledging the accuracy of their post-arrest statements. The post-arrest and guilty-plea statements inculpating defendant were admitted as substantive evidence pursuant to 725 ILCS 5/115-10.1 as they were inconsistent with the co-defendants' testimony at trial. The State never argued to the jury or even suggested that the co-defendants' guilt was evidence of defendant's guilt.

Nor was it error to elicit evidence of the sentences that the co-defendants received. The jury was not informed of the sentences for the improper purpose of suggesting that defendant faced a comparable sentence if convicted, but to emphasize the doubtful explanation offered by the co-defendants for their decision to plead guilty.

It was also not error for the prosecutor to elicit evidence that defendant was not present when the co-defendant pleaded guilty. This evidence was offered to provide a plausible explanation for the co-defendant's contrary testimony at trial, i.e., that defendant's absence at the plea hearing made it easier for the co-defendant to testify to defendant's guilt, and defendant's presence at trial made it difficult for the co-defendant to repeat that testimony.

Justice Robert E. Gordon specially concurred. It was error, although harmless, to elicit evidence of co-defendants' guilty pleas, where it was not necessary to elicit that evidence in order to introduce the prior inconsistent statements they made at the plea hearing.

People v. Fillyaw and Parker, 409 Ill.App.3d 302, 948 N.E.2d 1116 (2d Dist. 2011) Statements made to a testifying witness by a third party describing events of which the witness has no firsthand knowledge are inadmissible as substantive evidence pursuant to the prior-inconsistent-statement exception to the hearsay rule provided by 725 ILCS 5/115-10.1(c)(2). Therefore, a statement made by Fillyaw to a prosecution witness admitting that he had kicked in a door and shot three people was inadmissible under the personal-knowledge limitation of §115-10.1(c)(2).

The admission of a nontestifying co-defendant's admission inculpating the defendant in the offense violates not only a defendant's federal constitutional right to confrontation, but also Illinois hearsay rules. Therefore, Fillyaw's statement implicating Parker in the commission of the offense was inadmissible against Parker. Although the jury was instructed to give separate consideration to each defendant, that any evidence limited to one defendant should not be considered as to the other, and that a statement made by one defendant may not be considered as to the other, it was given no contemporaneous instruction to disregard the statement when considering Parker's guilt. These instructions were

insufficient to remedy the state law error; only complete redaction of all references to Parker would suffice.

The admission of this evidence was plain error. Because the error implicated defendant's due process and confrontation clause rights, it necessarily affects substantial rights and satisfies the second prong of the plain-error analysis. The seriousness of the error was compounded by the repeated references to the statement at trial and in the prosecutor's argument to the jury, the admission of the statement as substantive evidence, and the fact that a copy of the statement accompanied the jury during its deliberations.

People v. Lee, 335 Ill.App.3d 1102, 781 N.E.2d 310 (1st Dist. 2002) The court rejected the State's argument that §115-10.1 is satisfied if the witness was available for cross-examination at some other "trial or hearing," and that admission of testimony from a prior trial is therefore authorized even if the witness is not available for cross-examination at defendant's trial. Thus, §115-10.1 did not authorize admission of evidence substantively where the declarant was deceased at the time of defendant's trial.

People v. Wilson, 331 Ill.App.3d 434, 771 N.E.2d 996 (2d Dist. 2002) A witness is "unavailable" under 725 ILCS 5/115-10.2, which authorizes the admission of certain hearsay concerning a material fact where a witness "persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so," where the witness appeared under subpoena, was ordered by the court to remain in the courthouse for jury selection so he could be called to testify the same morning, stated that he was "willing to get locked up in order to look out for the future, my family," and could not be found when called to testify. The court distinguished **People v. Drum**, 321 Ill.App.3d 1005, 748 N.E.2d 344 (4th Dist. 2001), in which the trial court found that witnesses were unwilling to testify based upon vague representations by their attorneys. Here, the witness "made manifest his refusal to testify" by "unambiguously [telling] the court that he was not going to testify" and that he was "willing to be incarcerated and accept the consequences for failing to testify," and by leaving the courthouse despite the judge's order to remain.

People v. Wetzell, 308 Ill.App.3d 886, 721 N.E.2d 643 (1st Dist. 1999) The trial judge erred by denying a defense request to use arrest and case reports both as impeachment and substantively. The officer's "written, signed arrest and case reports . . . fit perfectly within" 725 ILCS 5/115-10.1, which permits the substantive use of prior inconsistent statements which: (1) explain an event within a witness's personal knowledge, and (2) are written or signed by the witness. Furthermore, allowing the jury to use the reports as impeachment did not "minimize the prejudice caused by excluding substantive use."

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People v. Zurita, 295 Ill.App.3d 1072, 693 N.E.2d 887 (2d Dist. 1998) To be "inconsistent" within the meaning of §115-10.1, the prior statement need not directly contradict the declarant's trial testimony. Instead, a prior statement that "has a tendency to contradict the

[witness's] trial testimony" is "inconsistent" for purposes of the statute. "Inconsistencies may be found in evasive answers, silence, or changes in position," as well as where the witness claims to be unable to recollect a matter that was included in the prior statement.

A statement is also inconsistent where it omits significant matters that would reasonably have been expected to be mentioned if true. Finally, whether a prior statement is inconsistent with trial testimony is left to the sound discretion of the trial court.

There were "critical inconsistencies" between testimony and statements where an out-of-court statement lacked any reference to defendant participating in the crime, while the trial testimony gave a detailed description of defendant's alleged conduct. The witness's "sudden memory of the defendant's participation . . . certainly appears to be a change of position tending to contradict" his prior statement. See also, **People v. Grayson**, 321 Ill.App.3d 397, 747 N.E.2d 460 (4th Dist. 2001) (to justify the substantive use of prior inconsistent statements under 725 ILCS 5/115-10.1, the proponent of the evidence must establish a foundation similar to that required to admit prior inconsistent statements as impeachment; thus, while the witness is on the stand he must be confronted with his prior statement, directed to its time, place, circumstances and substance, and given an opportunity to explain the inconsistency).

People v. Radovick, 275 Ill.App.3d 809, 656 N.E.2d 235 (1st Dist. 1995) Section 115-10.1 authorizes the admission of prior statements that are inconsistent with a witness's testimony at trial, provided that the witness is subject to cross-examination and made the prior statement under oath. However, §115-10.1 allows only "inconsistent" statements to be admitted; "wholly irrelevant or unfairly prejudicial evidence" must be excluded.

Under the "plain language" of 115-10.1, the trial judge should have redacted grand jury testimony to exclude portions that implicated the defendant in other murders and concerned matters about which the declarants had not been questioned at trial. The trial court was instructed that if the issue arises again at defendant's new trial, "only those portions of the grand jury transcripts which can reasonably be characterized as 'inconsistent' with trial testimony" may be admitted

People v. Lawrence, 268 Ill.App.3d 327, 644 N.E.2d 19 (1st Dist. 1994) Only the "inconsistent" portions of an out-of-court statement may be admitted under 725 ILCS 5/115-10.1. In addition, an entire statement cannot be deemed "inconsistent" with the declarant's testimony merely because it omits information included in the testimony; an "inconsistency" does not exist merely because "certain evidence is omitted from an earlier statement" but is subsequently "found to be relevant and testified to at trial."

People v. Hallbeck, 227 Ill.App.3d 59, 590 N.E.2d 971 (2d Dist. 1992) A party seeking to admit a prior inconsistent statement must lay a proper foundation by asking the witness whether he made the statement; such a foundation is required whether the inconsistent statement is introduced as impeachment or as substantive evidence.

People v. Cooper, 188 Ill.App.3d 971, 544 N.E.2d 1273 (5th Dist. 1989) A prior statement that defendant said he had just robbed the victim was not admissible under §155-10 - subsection (c)(2) of §115-10 authorizes admission only if the statement narrates, describes, or explains "an event or condition of which the witness had personal knowledge." The "personal knowledge required by the statute is not that which is acquired by being told something, even if an admission; rather, it means the witness whose prior inconsistent

statement is being offered into evidence must actually have perceived the events which are the subject of that statement."

Since the witness's prior statement was not based on his perception of the robbery itself, the statement was not admissible as substantive evidence. See also **People v. Coleman**, 187 Ill.App.3d 541, 543 N.E.2d 555 (4th Dist. 1989) (§115-10.1(c)(2) requires that the witness-declarant must have personally observed the underlying events (i.e., the crimes); simply overhearing incriminating statements by a defendant is insufficient; however, statements were admissible under §115-10.1(c)(1), which authorizes admission of statements "made under oath at a trial, hearing, or other proceeding"); **People v. Morales**, 281 Ill.App.3d 695, 666 N.E.2d 839 (1st Dist. 1996) (the "personal knowledge" requirement of 725 ILCS 5/115-10.1 is satisfied only when the declarant personally observed the events that are the subject matter of the statement; admission is not authorized where a witness merely testifies as to what another person claims to have done). See also, **People v. Thomas**, 178 Ill.2d 215, 687 N.E.2d 892 (1997) (Supreme Court acknowledged Appellate Court caselaw interpreting "personal knowledge" requirement, but declined to reach issue).

People v. Hastings, 161 Ill.App.3d 714, 515 N.E.2d 260 (1st Dist. 1987) A police officer's oral testimony that certain statements were made by a witness did not satisfy the requirement of ¶115-10.1(c)(2)(A) that the "statement is proved to have been written or signed by the witness." See also, **People v. Young**, 170 Ill.App.3d 969, 624 N.E.2d 982 (1st Dist. 1988) (statement signed by the witness was admissible); **People v. Edwards**, 167 Ill.App.3d 324, 521 N.E.2d 185 (2d Dist. 1988) (signed statements were admissible).

§19-16
Prior Consistent Statements

United States Supreme Court
Tome v. U.S., 513 U.S. 150, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995) Federal Rule of Evidence 801(d)(1)(B), which provides that a prior consistent statement is not hearsay where "offered to rebut an express or implied charge . . . of recent fabrication or improper influence or motive," authorizes only the admission of prior consistent statements made before the alleged fabrication or motive came into existence. Although Rule 801 does not specifically contain a temporal requirement, Congress intended to continue the common law requirement that prior consistent statements are relevant only if made before the fabrication or motive arose.

Illinois Supreme Court
People v. Tisdel, 201 Ill.2d 210, 775 N.E.2d 921 (2002) Prior out-of-court statements may be admitted to corroborate trial testimony on the same subject only if: (1) the prior consistent statement is used to rebut a charge or inference that the witness is motivated to testify falsely or that his in-court testimony is a recent fabrication, or (2) the out-of-court statement is one of identification.

The court overruled **People v. Hayes**, 139 Ill.2d 89, 564 N.E.2d 803 (1990), which held that the trial court erred by admitting testimony that before identifying the defendant, a witness viewed pictures of other persons and failed to make an identification. Hayes held that such statements concern "non-identification" rather than "identification," and that the second exception to the general rule therefore did not apply.

Here, the court concluded that Hayes' limitation of the "statements of identification" exception was "flawed," and that the exception should be construed to include the "entire identification process," including "non-identification" procedures.

People v. Emerson, 97 Ill.2d 487, 455 N.E.2d 41 (1983) Prior consistent statements may be introduced to corroborate trial testimony when it is charged that the witness's testimony is a recent fabrication, or where there is a motive to testify falsely and the prior consistent statement was made when such motive did not exist. Where the motive (the witness's alleged debt to the defendant) existed when the prior statements were made, the statements were inadmissible.

The defense did not open the door to the prior statements by attempting to impeach the witness; the impeachment was designed to show that one of the perpetrators had not participated in certain conduct during the offense, and was "not directed to the identity of the assailants." Consequently, it "did not open the door to a gratuitous corroboration of . . . testimony concerning the identity of [the] attackers."

The Court also noted that in closing argument the prosecutor made reference to the prior statements on at least four occasions. "This was improper and erroneously emphasized the corroborative effect" of a statement which should not have been admitted. See also, **People v. Henderson**, 142 Ill.2d 258, 568 N.E.2d 1234 (1990) (error to admit prior consistent statement made where motive to fabricate (desire to help relatives) existed when prior statement was made; however, issue was waived because not included in post-trial motion); **People v. Orange**, 121 Ill.2d 364, 521 N.E.2d 69 (1988) (trial judge properly excluded a letter written after the writer decided to exonerate the defendant; same motive existed at trial and when the letter was written). Compare, **People v. Harris**, 123 Ill.2d 113, 526 N.E.2d 335 (1988) (prior testimony to grand jury properly admitted to rehabilitate impeached witness where defense failed to show that motive to fabricate existed at time of grand jury proceedings).

People v. Powell, 53 Ill.2d 465, 292 N.E.2d 409 (1973) Evidence that a witness made a prior statement which is consistent with his testimony is generally inadmissible. However, evidence of a prior consistent statement is admissible when: (1) it is charged that testimony of the witness is of recent fabrication or that the witness has some motive for testifying falsely, and (2) the prior consistent statement was made before the time of the alleged fabrication or before the motive to testify falsely came into existence.

People v. Clark, 52 Ill.2d 374, 288 N.E.2d 363 (1972) Prior consistent statement was not admissible where the motive to fabricate existed when the statement was made. Compare, **People v. Titone**, 115 Ill.2d 413, 505 N.E.2d 300 (1986) (prior statement properly admitted).

People v. DePoy, 40 Ill.2d 433, 240 N.E.2d 616 (1968) A prior consistent statement may not be introduced merely because the decedent has been impeached with prior inconsistent statements. See also, People v. Manley, 104 Ill.App.3d 478, 432 N.E.2d 1103 (1st Dist. 1982).

Illinois Appellate Court

People v. Doehring, 2021 IL App (1st) 190420 On direct examination of a key eyewitness, the State elicited testimony that the witness had given a similar account of the crime during a discussion with the police. Defendant's objection to this prior consistent statement was overruled. The appellate court affirmed.

First, the statement was admissible to rebut a charge of recent fabrication, where defense counsel used his opening statement to impugn the credibility and motivations of the State's witnesses. Even if allegations in opening are insufficient, defendant's cross-

examination of the witness also attacked his credibility, making the admission of the prior consistent statement a question of timing, or a mere technical error, where it would have been admissible on re-direct anyway.

Second, the Appellate Court rejected the argument that the witness had a similar motive to lie at the time of the prior statement. The record did not establish a clear change in motive, but it was enough that since the original statement, the witness's brother had been charged as a co-defendant and the witness himself was susceptible to prosecution as a potential accomplice.

Regardless, any error was harmless where the evidence of guilt was overwhelming and the jury received the accomplice witness instruction which required it to treat this witness' testimony with suspicion.

People v. Ortega, 2021 IL App (1st) 182396 The trial court did not err in admitting prior consistent statements at defendant's murder trial. Initially, the Appellate Court refused to consider the claim under the second-prong of the plain error test, rejecting the idea that the introduction of improper prior consistent statements equates to "structural error." In any event, the court found no improper testimony. While two eyewitnesses testified as to what they told each other about the murder and what they told the police, these statements qualified as statements of identification under section 115-12. The rule against prior consistent statements does not apply to statements of identification.

Regarding another allegedly improper prior consistent statement, the court found not just forfeiture but affirmative waiver, because defense counsel attempted to use the prior statement to impeach the witness. A co-defendant testified that he told the police the same version of events, prior to receiving a deal. Counsel cross-examined the witness to show how both his testimony and his statement to police were contradicted by a surveillance video. Any alternative claim that this constituted ineffective assistance of counsel would be foreclosed given that discrediting the witness was counsel's strategy at trial.

People v. Holliday, 2020 IL App (5th) 160547 Victim testified at defendant's trial that after hearing defendant's name, he located defendant's picture on Facebook, recognized defendant, and recognized the gun in the picture as the one used to shoot him. Similarly, a police officer testified that the victim had provided this same information at the time he identified defendant in a photo lineup. This testimony was not improper prior consistent statement evidence. Under 725 ILCS 5/115-12, a statement is not inadmissible hearsay if (a) the declarant testifies at trial, (b) the declarant is subject to cross examination regarding the statement, and (c) the statement is one of identification of a person made after perceiving him.

The victim's testimony met the requirements of Section 115-12. That section is not limited to formal identification procedures like lineups, but includes all identification evidence. And, because the victim's testimony was admissible under 115-12, the officer's testimony about the victim's statements was also admissible.

People v. Baker, 2019 IL App (2d) 160791 The complainant's testimony that she reported "what happened" is not a prior consistent statement because she did not provide details about what she said. There was therefore no consistency between the testimony and the prior statement. The co-worker's testimony, however, was an improper prior consistent statement. Illinois Rule of Evidence 613(c) states that prior consistent statements are not admissible as a hearsay exception, and therefore the trial court erred in finding the statement admissible

as an excited utterance. But the error was not included in a post-trial motion and did not rise to the level of first-prong plain error.

Because neither of these hearsay exceptions applied, the outcry was an inadmissable prior consistent statement. The State did not elicit the statement to rebut a charge of recent fabrication; the State elicited the statement on direct examination. However, the error was not prejudicial where defendant confessed and the complainant credibly testified about the offense at trial.

The Appellate Court found the errors harmless. The prior consistent statement was not actually introduced, and the State provided other substantial evidence of guilt. The prosecutor's expression of a personal belief was minor and the evidence supported an inference that the witness was credible

People v. Davis and People v. Graham, 2018 IL App (1st) 152413 The trial court erred when it allowed the State to introduce prior consistent statements of one recanting witness along with prior inconsistent statements. Where prior statements are consistent in some ways and inconsistent in others, courts should not use an "all or nothing" approach and introduce the entire prior statement. Trial courts must determine whether the statement is inconsistent and admit only those portions which were actually inconsistent. However, because the improperly admitted statements were not material, any error was harmless.

The trial court did not abuse its discretion in admitting the entire prior statement of a second recanting witness. This witness' testimony was difficult to decipher because of evasiveness and repeated claims of memory loss. Thus, despite some consistencies in details, it was not error to rule that the entire prior statements were inconsistent.

The trial court did not abuse its discretion in admitting gang evidence. The State provided evidence that the shooting was gang motivated, and therefore gang evidence was relevant. The State did not call an expert on gang evidence or inundate the jury with gang evidence, and therefore the gang evidence was not overly prejudicial. Although evidence suggested that co-defendant Davis was in a different gang from the two gangs at war, evidence did show that co-defendant Graham was in one of the two warring gangs and that Davis acted in concert with Graham.

People v. Randolph, 2014 IL App (1st) 113624 Where the defense cross-examined one of the arresting officers about the fact that some aspects of his testimony had been omitted from his police report, the trial court erred by allowing the prosecution to elicit testimony concerning portions of the police reports that were consistent with the officer's testimony. The Appellate Court questioned whether defense counsel raised a charge of recent fabrication by focusing the cross-examination on the report's omissions concerning defendant's conduct. The court concluded that such questions, standing alone, would not have permitted the State to introduce prior consistent statements because "if impeachment by omission justified the introduction of such hearsay, the exception would swallow the rule."

On the other hand, at one point defense counsel asked the officer whether a fact he was "remembering today" had been left out of his police report. The court acknowledged that this question implied recent fabrication and thus might invite the introduction of a prior consistent statement.

However, the statements elicited by the prosecution did not disprove, explain or qualify the inconsistencies between the report and the officer's trial testimony. Instead, the prosecutor merely asked the police officer to recite that his report contained some facts that were consistent with his testimony at trial. Such evidence merely reinforced the trial

testimony without shedding light on why certain facts had been omitted from the police report in the first place. Thus, it should not have been admitted.

Furthermore, even where prior consistent statements are properly admitted, the jury should be instructed that the statements are admissible only to rebut a charge of recent fabrication. In addition, it is improper for the State to refer the prior consistent statements as substantive evidence in closing argument. In this case, there was no limiting instruction, and the State invited the jury to consider the prior statement substantively. Those errors, together with the fact that the State's case hinged entirely on the credibility of the police officers, "convince us that the result of the trial may well have been different" had the prior consistent statements not been admitted.

People v. Ruback, 2013 IL App (3d) 110256 Defendant's wife testified as a prosecution witness and denied that she participated with defendant in a sexual assault. The State introduced as substantive evidence her prior inconsistent statement to the police in which she implicated herself and defendant in the assault. The trial court excluded evidence that she denied the assault at the beginning of the same police interview.

The State implied that defendant's wife had a motive to falsify her exculpatory trial testimony because she was married to the defendant and had communicated with him a month prior to trial. Her prior consistent statement denying the sexual assault was not admissible to rebut that charge of motive to falsify, because the defense could not show that she did not have a motive to falsify when she initially denied the allegations. At the time of the police interview, she was married to the defendant and was herself a suspect.

Her initial statement to the police was also not admissible to rebut a charge of recent fabrication. The State made no charge of recent fabrication. The mere fact that a witness's testimony has been discredited or contradicted is insufficient to allow use of a prior consistent statement because such an expansion of the exception would swallow the rule. If the only requirement necessary to trigger the exception was the existence of an inconsistent statement prior to trial, the exception would negate the rule *in toto*.

Under the completeness doctrine, if one party introduces part of an utterance or writing, the opposing party may introduce the remainder or so much thereof as is required to place that part originally offered in proper context so that a correct and true meaning is conveyed to the trier of fact. The remaining part is admissible only when in fairness it is required to prevent the trier of fact from receiving a misleading impression as to the nature of the introduced statement. The remaining part must concern what was said on the same subject at the same time.

Defendant's wife's statements from the beginning of the police interview denying the sexual assault were not admissible under the completeness doctrine because they "do not explain why she later denied the allegations, or qualify her later statements; they merely contradict the prior inconsistent statement admitted into evidence by the State."

Schmidt, J., specially concurred. There is only one exception to the rule against admission of prior consistent statements. A prior consistent statement is admissible to rebut a charge that a witness lied only if a motive to falsify did not exist at the time of the prior statement.

A reasonable juror would have concluded that the State did charge that defendant's wife's testimony was a lie, but her prior statement was not admissible to rebut that charge because she had a motive to falsify at the time of the prior statement. The completeness doctrine challenge was forfeited because defendant did not argue it below. Even if error had occurred, it was harmless beyond a reasonable doubt.

Holdridge, J., specially concurred. The prior statement was admissible under the completeness doctrine. It was part of the same police interview, part of which the State introduced. The statement would have established the context of the statement that the jury did hear and would have qualified that statement in the context of the wife's overall credibility. But its exclusion was harmless beyond a reasonable doubt because the evidence of guilt was overwhelming and there was nothing in the entire statement that would have been of help to the defendant.

People v. Matthews, 2012 IL App (1st) 102540 The State introduced the written statement and grand jury testimony of its witness that were consistent with the witness's trial testimony. Although a charge was made that the witness had a motive to fabricate, the prior statements were not made before the motive to fabricate arose, and therefore should not have been admitted.

The admission of this evidence was plain error because the evidence was closely balanced. Much of the State's case relied on the testimony of this witness that the defendant admitted to killing the murder victim. While defendant's DNA was found under the victim's fingernails and her fingerprints were found on a metal tin next to a night table, this evidence was consistent with defendant's relationship with the victim. No other physical evidence connected defendant to the offense.

The Appellate Court reversed defendant's conviction and remanded for a new trial.

People v. Johnson, 2012 IL App (1st) 091730 The general rule is that prior consistent statements are inadmissible to corroborate the trial testimony of a witness because the statements serve to unfairly enhance the credibility of the witness. The jury is likely to attach disproportionate significance to them as people tend to believe that which is most often repeated, regardless of its intrinsic merit.

Prior consistent statements are not admissible merely because the testimony of a witness has been discredited, or opposing counsel has sought to challenge his testimony. They may be introduced to rebut an allegation that the witness was motivated to testify falsely, or otherwise to rebut an allegation of recent fabrication. To qualify for this exception, the prior consistent statements must have been made prior to the existence of the alleged motive to testify falsely or the alleged fabrication.

Prior consistent statements of a prosecution witness were not properly admitted to rebut an allegation that the witness was motivated to testify falsely. Although the State elicited evidence that defendant and the witness were in rival factions of the same gang, defense counsel did not argue that the witness had a motive to falsely implicate the defendant in the crime. The defense position was that the witness's identification of defendant was honest, but mistaken. A charge of mistake or inaccuracy is not sufficient to render admissible the prior consistent statements of a witness.

Even if the defense had chosen to argue that the witness had a motive to falsify due to their gang rivalry, the State could only have introduced the prior consistent statement upon a showing that the statement predated the existence of the rivalry. There is no question here that the gang rivalry, as well as any motive to fabricate that might have arisen from that gang rivalry, preexisted the offense.

People v. Rivera, 409 Ill.App.3d 122, 947 N.E.2d 819 (1st Dist. 2011) A note that the complaining witness wrote to her friend containing details consistent with her trial testimony was not admissible as a prior consistent statement. The defense did suggest that the complainant had a motive to lie, but that motive arose before the note was written.

Certain statements by the complainant are admissible in the prosecution of certain offenses perpetrated against a child under the age of 13, but the out-of-court statements must have been made before the complainant attained 13 years of age or within three months after the commission of the offense, whichever is later. 725 ILCS 5/115-10(b)(3). The note containing the statements at issue was written after the complainant turned 14, and did not qualify as a statement made within three months of the date of the commission of the offense, as the State never clearly established the date of the last sexual act between defendant and complainant.

People v. McWhite, 399 Ill.App.3d 637, 927 N.E.2d 152 (1st Dist. 2010) Even where admissible on a charge of recent fabrication or motive to lie, prior consistent statements go only to rehabilitate the witness and may not be used as substantive evidence. Prior statements are not admissible merely because a witness's testimony has been discredited or to rebut a charge of mistake, poor recollection, or inaccuracy.

Statements which a surveillance officer made during his preliminary hearing testimony and in his arrest reports were improperly admitted at a trial for possession of heroin with intent to deliver. Although defense counsel impeached the officer with the fact that certain facts had been omitted from the vice case report, the impeachment by omission fell short of charging recent fabrication or a motive to lie. Furthermore, had there been a suggestion of recent fabrication or motive to lie, the officer's statements at the preliminary hearing and in the arrest reports would have been inadmissible because they arose after the charge or motive would have come into existence.

Because the officer was the only witness for the State and the trial court specifically relied on the improperly-admitted statements in finding that the officer's testimony was credible, it was not clear that the verdict would have been the same had the statements not been admitted. Thus, the error was not harmless.

People v. Maldonado, 398 Ill.App.3d 401, 922 N.E.2d 1211 (1st Dist. 2010) Evidence that a witness made a prior consistent statement is generally inadmissible for the purpose of corroborating trial testimony, unless the opposing party contends that the witness recently fabricated his or her testimony and the prior statement was made before the alleged motive to fabricate arose. Here, the trial judge improperly admitted prior consistent statements which were made after the alleged motive to fabricate came into existence.

Defense counsel argued that when the witness was first interviewed by police, she truthfully said that she had no knowledge of the offense. Counsel alleged that after being detained at the police station for several hours, the witness falsely inculpated the defendant. Counsel also argued that the witness repeated the false accusation in her testimony before the grand jury and at trial.

Because the statements which were admitted to corroborate the witness's trial testimony - her statement at the police station and her grand jury testimony - were both made after the motive to falsify arose, they did not rebut counsel's allegations and should not have been admitted.

Defendant's conviction for first degree murder was reversed and the cause remanded for a new trial.

People v. Walker, 335 Ill.App.3d 102, 779 N.E.2d 268 (2d Dist. 2002) A prior consistent statement is admissible only to rebut a charge or inference that the declarant is motivated to testify falsely or that her testimony is of recent fabrication, so long as the prior statement was made before the motive or alleged fabrication arose. Although the prior statement was

admissible to rebut defendant's allegations that the witness had a motive to lie, it should not have been admitted for the truth of the matters asserted.

The court rejected the State's argument that the prior consistent statement was admitted only non-substantively. Although the trial court failed to expressly permit substantive use of the statement, the State sought to admit it as substantive evidence and argued to the jury that it "tells the truth." In addition, in response to the jury's request the trial court sent the statement to the jury room without an instruction limiting the purpose for which it could be considered. Under such circumstances, the jury likely believed it could use the statement for any purpose, including substantively. The court also noted that the prior statement made allegations that the witness had not included in her testimony.

People v. Terry, 312 Ill.App.3d 984, 728 N.E.2d 669 (1st Dist. 2000) Although prior consistent statements are admissible to rebut an inference of recent fabrication, admissibility depends on a showing that the consistent statements were made before there was a motive to fabricate. Where the statements were made after the declarant had been arrested and questioned for two days, "which may have meant that he was a suspect," there was a motive to place the blame on the defendant. Thus, the prior statements were inadmissible.

People v. Miller, 302 Ill.App.3d 487, 706 N.E.2d 947 (1st Dist. 1998) A prior consistent statement is admissible to rebut a charge of recent fabrication only if it was made before the alleged motive to fabricate arose. A charge of recent fabrication does not arise merely because evidence is introduced to contradict a witness's testimony or because the witness is impeached; "[i]f courts were to admit prior consistent statements whenever there was any questioning or contradiction of a witness' testimony, the exception would swallow the rule." See also, **People v. Wetzell**, 308 Ill.App.3d 886, 721 N.E.2d 643 (1st Dist. 1999) (prior consistent statement is not admissible merely because a witness's testimony has been impeached).

People v. Lambert, 288 Ill.App.3d 450, 681 N.E.2d 675 (2d Dist. 1997) A witness's prior consistent statement was admissible as rehabilitation where on cross-examination, defense counsel suggested that the witness's testimony "was the product of a motivation" to obtain a favorable plea agreement. In addition, defense counsel sought to convince the jury that the witness's testimony had been fabricated in response to the suggestion of a third party. Although the witness denied telling the third party that he would testify falsely, the import of the defense cross-examination and evidence clearly suggested to the jury that the testimony was fabricated.

However, the prior consistent statement of a second witness was not admissible on the theory that the defense charged that his testimony was a recent fabrication. The "only portion of . . . cross-examination . . . which may be said to remotely raise a charge of recent fabrication" was counsel's elicitation of the fact that the witness had rehearsed his testimony with prosecutors. Rejecting **People v. Askew**, 273 Ill.App.3d 798, 652 N.E.2d 1041 (1st Dist. 1995) and **People v. Ollins**, 235 Ill.App.3d 158, 601 N.E.2d 922 (1st Dist. 1992), the Court held that the fact that a witness rehearsed his testimony with counsel does not imply that any fabrication occurred.

In addition, the trial judge erred by admitting the prior consistent statements of both witnesses as substantive evidence. In general, Illinois follows a common law rule that a prior consistent statement is admissible only for rehabilitation. The rationale for this rule is that although "mere repetition does not imply veracity," the trier of fact is likely to place belief "in that which is most often repeated."

Furthermore, the substantive use of the statements was not harmless error. The witnesses in question were crucial to the State's case, because they were the only eyewitnesses to testify for the State and their testimony was the only evidence directly linking defendant to the crimes. In addition, the prosecutor repeatedly emphasized the prior statements during closing arguments, and the evidence was close. In rejecting the State's harmless error argument, the Court concluded that "[i]f prejudice cannot be found on the facts of this case, we doubt it will ever be found."

People v. Wheeler, 186 Ill.App.3d 422, 542 N.E.2d 524 (4th Dist. 1989) It was error for a State witness to testify that shortly after the incident he gave a statement to the police describing the perpetrator, and for the prosecutor to comment in closing argument concerning that description, where there was no allegation of recent fabrication or that the witness had any greater motive to lie after the statement than before.

People v. Kennedy, 150 Ill.App.3d 319, 501 N.E.2d 1004 (5th Dist. 1986) The prior consistent statements of two accomplices, made at the time of their arrests, were properly admitted to rebut the defense theory that the accomplices were motivated to testify falsely by their hope to be charged with a lesser offense and receive shorter sentences. The prior statements were made before any potential deal or plea bargaining was discussed with the accomplices, and therefore before any motive to testify falsely arose.

People v. Davis, 130 Ill.App.3d 41, 473 N.E.2d 387 (1st Dist. 1984) Testimony about a robbery complainant's prior consistent statements was improper due to insufficient foundation; if the defense raised an inference of fabrication or motive to testify falsely, such inference also existed when the prior consistent statements were made. See also, **People v. Borges**, 127 Ill.App.3d 597, 469 N.E.2d 321 (1st Dist. 1984) (alleged motivation to lie existed at the time of the prior statements); **People v. Smith**, 139 Ill.App.3d 21, 486 N.E.2d 1347 (1st Dist. 1985) (same).

People v. Tidwell, 88 Ill.App.3d 808, 410 N.E.2d 1163 (2d Dist. 1980) A prior consistent statement may not be used to corroborate or bolster in-court testimony unless: (1) it is charged that the in-court testimony is a recent fabrication, in which case the prior consistent statement may be used to refute that contention, or (2) it is contended that the witness has a positive motive for testifying falsely, in which case a prior consistent statement may be used to show that the witness told the same story when no such motive existed or could have been foreseen.

Because neither of the above exceptions were present, the trial court erred by allowing the State to read a statement made by an accomplice to the police about a week after the robbery, where the statement was consistent with the accomplice's testimony.

People v. Hudson, 86 Ill.App.3d 335, 408 N.E.2d 325 (5th Dist. 1980) The improper admission of five witnesses' prior consistent statements was plain error and prejudicial - the statements were used to improperly bolster the witnesses' testimony and as substantive evidence of guilt, and "clouded the evidence to such a degree as to make it impossible to determine whether the jury relied upon [them]."

§19-17
Prior Statements of Identification

Note: 725 ILCS 5/115-12 allows certain out-of-court statements of identification to be used as substantive evidence where the declarant testifies and is subject to cross-examination concerning a statement identifying a person after perceiving him.

Illinois Supreme Court

People v. Lewis, 223 Ill.2d 393, 860 N.E.2d 299 (2006) The plain language of §115-12 does not require that the declarant testify about the statement of identification before a third party testifies about it. The declarant was "available" for cross-examination although she was not questioned about the statement on direct examination. Generally, a witness is subject to cross-examination when he or she takes the witness stand, is placed under oath, and responds willingly to questions. Although the scope of cross-examination is generally limited to the subject matter of direct examination and matters affecting credibility, this limitation is construed liberally to permit inquiry on subjects which tend to explain, discredit or destroy the witness's direct testimony. Where the principal issue is identification, the defendant is given wide latitude to question the identifying witness on matters explaining or discrediting the identification.

Because defendant did not attempt to cross-examine the declarant on her out-of-court statement, he could not claim that he was prohibited from doing so by the rule limiting the scope of cross-examination. "[H]ad [the trial court] been given the opportunity to apply our case law, defendant should have been allowed to question [the declarant] on her out-of-court identification because that subject is directly relevant to challenging the identification made from the witness stand."

In addition, the defendant could have recalled the declarant after the third party testified about the identification. Although recalling a witness is left to the discretion of the trial court, it would be an abuse of discretion to deny a request to recall a witness if the defendant would be deprived of an opportunity to present evidence crucial to his defense.

Although the post-trial motion stated only that hearsay had been improperly admitted, without identifying the hearsay testimony or the name of the witness involved, the court concluded that the issue was sufficiently preserved for review. The trial court clearly understood that defendant was challenging the admissibility of the evidence under 730 ILCS 5/115-12. In addition, only two hearsay objections, both of which concerned the same testimony, were raised at trial. See also, **People v. Miller**, 363 Ill.App.3d 67, 842 N.E.2d 290 (1st Dist. 2005) (declarant is "available" for cross-examination, both for purposes of §115-12 and under **Crawford v. Washington**, if he or she is "available at trial, under oath, and willing to testify"; the declarant is not "unavailable" for cross-examination merely because he denies making the out-of-court statement).

People v. Tisdel, 201 Ill.2d 210, 775 N.E.2d 921 (2002) Prior out-of-court statements may not be admitted to corroborate trial testimony on the same subject, unless: (1) the prior consistent statement is used to rebut a charge or inference that the witness is motivated to testify falsely or that his in-court testimony is a recent fabrication, or (2) the out-of-court statement is one of identification.

The court overruled **People v. Hayes**, 139 Ill.2d 89, 564 N.E.2d 803 (1990), which held that the trial court erred by admitting testimony that before identifying the defendant, a witness viewed pictures of other persons and failed to make an identification. Hayes held

that such statements concern "non-identification" rather than "identification," and that the second exception to the general rule therefore did not apply.

Here, the court concluded that Hayes' limitation of the "statements of identification" exception was "flawed," and that the exception should be construed to include the "entire identification process," including "non-identification" procedures.

People v. Beals, 162 Ill.2d 789, 643 N.E.2d 789 (1994) Although a general rule of evidence is that a witness may not testify regarding out-of-court statements that corroborate statements made by a witness or third party, that general rule does not apply to statements of identification. Thus, where a witness who previously identified the offender is available for cross-examination, a third person's corroborative testimony that he heard or saw the identification is reliable and admissible.

People v. Colon, 162 Ill.2d 23, 642 N.E.2d 118 (1994) Although the trial court may have erred by admitting evidence that two persons who did not testify had identified defendant in a lineup, the error was harmless where defendant was positively identified by two other witnesses and there was a substantial amount of corroboration. Hearsay testimony of an out-of-court identification is reversible error only if it serves as a substitute for a courtroom identification or is used to strengthen or corroborate a weak identification.

People v. Holveck, 141 Ill.2d 84, 565 N.E.2d 919 (1990) Testimony of an out-of-court identification of the defendant by a declarant is admissible under §115-12 even if the declarant does not make an in-court identification. The statute merely requires that the declarant testify at trial and be subject to cross-examination regarding the out-of-court statement of identification. See also, **People v. Bowen**, 298 Ill.App.3d 829, 699 N.E.2d 1117 (1st Dist. 1998) (**Holveck** overruled **People v. Davis**, 137 Ill.App.3d 769, 44 N.E.2d 1098 (1st Dist. 1985), which interpreted 725 ILCS 5/115-12 as permitting the admission of prior statements of identification only if those statements were consistent with the declarant's identification of the defendant at trial).

People v. Arman, 131 Ill.2d 115, 545 N.E.2d 658 (1989) It was improper for a police officer to testify that a witness identified the defendant's photo from the Chicago Police Department's identification files. When identification is a material issue, testimony relating the use of mug shots in an investigation may be introduced to show how a defendant was initially linked to the commission of an offense. However, mug shot evidence which informs the jury of the defendant's commission of unrelated criminal acts should not be admitted. By referring to the photograph as having come from the Police Department's identification files, the officer informed the jury that the person depicted had been previously arrested. See also, **People v. Nelson**, 193 Ill.2d 216, 737 N.E.2d 632 (2000) (State committed reversible error by eliciting officer's testimony that the complainant was shown several sets of mug shots portraying the defendant; the jury was informed, "in a not-so-subtle manner," that mug shots had been taken on three different occasions that were far enough apart for defendant's appearance to change, and that the most recent photograph was taken near the time of the offenses that were being prosecuted).

People v. Shum, 117 Ill.2d 317, 512 N.E.2d 1183 (1987) The State elicited testimony, from the victim and a police officer, that the victim said she had been shot by "Keith." The victim

was previously acquainted with Keith and made an in-court identification of the defendant, who first name was Keith.

The Supreme Court held that the victim's statement was one of identification; thus, her testimony, and that of the police officer, was admissible.

People v. Yates, 98 Ill.2d 502, 456 N.E.2d 1369 (1983) To establish a sufficient foundation to use a police artist sketch to impeach identification testimony, the person who prepared the sketch must testify that the identification witness previously adopted and confirmed the sketch as an accurate drawing. "We deem it advisable to require unequivocal testimony from the police artist that the drawing not only was a representation prepared at the direction of the witness," but that the witness, "after having had the opportunity to view the completed sketch, adopted it as an accurate portrayal of the suspect." The Court also noted that the foundation is satisfied even if the identification witness denies that he agreed to the sketch's accuracy.

Illinois Appellate Court

People v. Guerrero, 2021 IL App (2d) 190364 The trial court erred in admitting the prior inconsistent statement of a State witness at defendant's aggravated battery trial. The State alleged that defendant threw a rock at the victim, Perez, and that Perez's companion, Beltran, witnessed the crime. On the stand, Beltran denied any knowledge of the crime. The State sought to introduce his prior statement under section 115-10.1. Because the statement was not recorded, it was admissible only if the State could prove, inter alia, that the statement was based on Beltran's personal knowledge of the events described, and that Beltran acknowledged under oath the making of the statement.

Although defendant did not contemporaneously object to the introduction of this evidence, the State did not raise forfeiture on appeal. Thus, the Appellate Court reviewed defendant's argument on the merits.

To prove the personal knowledge requirement, Beltran did not have to testify that he witnessed the events. Rather, the question is resolved by looking at the face of the prior statement. Here, the State adequately proved the personal knowledge requirement, because the prior statement contained Beltran's assertion that he personally observed the aggravated battery.

The State did not prove the acknowledgment requirement. Beltran testified he spoke with the police, but under section 115-10.1, the witness must acknowledge making the specific statement the State seeks to admit. Here, Beltran denied making the statements at issue. The trial court abused its discretion in finding Beltran's general acknowledgment of a conversation with police satisfied section 115-10.1.

Defendant also challenged the admission of Beltran's prior identification of defendant in a photo array. Defendant alleged that Beltran did not "perceive" defendant as required by section 115-12, because, although he admitted to making the identification, he denied witnessing the crime. The Appellate Court rejected the argument. Section 115-12 does not require the witness to admit he perceived the defendant committing the crime, only that he had personally perceived him in the past.

However, the trial court did err when it allowed the detective to testify that Beltran identified defendant as the person he saw committing an aggravated battery. This allowed the State to admit under section 115-12 what it could not properly admit under section 115-10.1. The detective should only have been allowed to testify that Beltran identified the person in the photo as defendant.

These errors were not harmless. Although the State had properly admitted Perez's prior inconsistent statement identifying defendant as his attacker, Perez was a convicted felon with a "drug problem" who denied making the statement at trial. And while defendant conceded that Beltran's prior inconsistent statement could have been admitted as impeachment even if not admitted substantively, the Appellate Court rejected this concession where Beltran was the State's witness and did not affirmatively damage the State's case, meaning the State could not impeach him. Finally, Beltran's statement corroborated Perez's prior statement, amplifying and providing credibility to that evidence. Thus, there was a reasonable likelihood of a different result at trial had Beltran's prior statement been properly excluded.

People v. Neal, 2020 IL App (2d) 170356 725 ILCS 5/115-12 allows a prior out-of-court identification to be admitted as substantive evidence at trial if the prior identification was made "after perceiving" defendant, so long as the declarant testifies at trial and is subject to cross-examination. See also Illinois Rule of Evidence 801(d)(1). As a matter of first impression, the Court held that the statute is not limited to identifications made only by eyewitnesses and victims after witnessing the criminal conduct. While the Court acknowledged that it was possible the legislature intended Section 115-12 to be limited to victims and eyewitnesses, it declined to read such a limitation into the statute where none was specifically included.

Here, the out-of-court identification was made by defendant's step-father after viewing video surveillance footage and photographs related to a series of retail thefts. At trial, that prior identification was admitted after the step-father testified that he had vision problems and could not identify the person in the State's photo exhibits because they were "blurry." Under the plain language of the statute, this was not error.

People v. Holliday, 2020 IL App (5th) 160547 Victim testified at defendant's trial that after hearing defendant's name, he located defendant's picture on Facebook, recognized defendant, and recognized the gun in the picture as the one used to shoot him. Similarly, a police officer testified that the victim had provided this same information at the time he identified defendant in a photo lineup. This testimony was not improper prior consistent statement evidence. Under 725 ILCS 5/115-12, a statement is not inadmissible hearsay if (a) the declarant testifies at trial, (b) the declarant is subject to cross examination regarding the statement, and (c) the statement is one of identification of a person made after perceiving him.

The victim's testimony met the requirements of Section 115-12. That section is not limited to formal identification procedures like lineups, but includes all identification evidence. And, because the victim's testimony was admissible under 115-12, the officer's testimony about the victim's statements was also admissible.

People v. Zimmerman, 2018 IL App (4th) 170695 Under Illinois Rule of Evidence 801(d)(1)(B) and 725 ILCS 5/115-12, the admissibility of prior statements of identification is not limited to the witness's actual identification of the offender but also includes the "entire identification process." Regardless, the trial court did not abuse its discretion in ruling that only the prior statement of identification by the witness was admissible here and in barring evidence from two other individuals that the witness repeated the identification to them. The repeated statements would be cumulative.

People v. Anderson, 2018 IL App (1st) 150931 Defendant was prosecuted under an accountability theory for various offenses, including murder, arising out of a shooting between two groups of individuals. To prove defendant's accountability, the State had to show he had the intent to promote or facilitate the shooter's criminal acts. The State relied on evidence that the gun belonged to defendant, that defendant made a threat to the intended victim's (Qualls') mother earlier that day, and that defendant reached for his gun before the shooter grabbed it when they thought they saw the intended victim's car.

When a State witness (Darden) testified at defendant's trial that he did not recall defendant making a threat to Qualls' mother, the State sought to impeach him with testimony he had given at the shooter's trial that such threat was made. The prosecutor quoted a question and answer from the shooter's trial, but only asked Darden if he remembered "being asked that question." While Darden answered yes, this was not an admission to having given the *answer* at the prior trial, and the State failed to otherwise prove up the impeachment. The Appellate Court found that this error was compounded by the prosecutor's unsupported closing argument claim that Darden previously told the police and grand jury that defendant made the alleged threat.

Although the error was not fully preserved, it amounted to first-prong plain error in this closely balanced case. There was conflicting evidence of defendant's role in the shooting, and the State's key witness (Carter) had credibility problems. "It would not have been irrational for the jury to conclude that the State failed to prove" defendant's intent, and thus there was a substantial probability that the State's reliance on the unproved threat influenced the outcome. The Appellate Court reversed and remanded for a new trial.

The Appellate Court also concluded that Carter's out-of-court statements accompanying his pretrial identifications of defendant and the shooter were properly admitted under Section 115-12 of the Code of Criminal Procedure. While those statements went beyond mere identification and provided some detail about what Carter claimed to have seen, a description of the offense may be admitted under 115-12 to the extent necessary to make the identification understandable to the jury. Although resolution of this issue was unnecessary to the outcome of the appeal because the Court had already remanded for a new trial, the Appellate Court opted to address it because it is likely to recur.

People v. Colon, 2018 IL App (1st) 160120 The trial court did not abuse its discretion when it admitted testimony that a witness identified defendant and another suspect in a lineup because they "kind of looked like" the offenders. The testimony met the broad definition of "statements of identification" under Rule 801 and as interpreted by **People v. Tisdel**, 201 Ill. 2d 210 (2002). Any deficiencies in the identification were explored in cross-examination.

People v. Whitfield, 2014 IL App (1st) 123135 Defendant argued that the out-of-court statement was inadmissible because the witness did not make an in-court identification of defendant and testified that he had never made such an identification. Defendant relied on **People v. Stackhouse**, 354 Ill. App. 3d 265 (1st Dist., 2004) for the proposition that an out-of-court statement of identification under 115-12 is not admissible when the witness unequivocally denies at trial that he made an out-of-court identification.

The court declined to follow **Stackhouse**, and instead held that there is no requirement in 115-12 that the witness confirm in his testimony that he made an identification. Thus even though the witness in this case denied identifying defendant as the shooter, his out-of-court statement of identification was substantively admissible under 115-12.

People v. Armstead, 322 Ill.App.3d 1, 748 N.E.2d 691 (1st Dist. 2001) The State erroneously introduced hearsay statements by a non-testifying witness who allegedly told police that defendant was the shooter. Admission of hearsay identification testimony constitutes plain error where it serves as a substitute for a courtroom identification or is used to strengthen or corroborate a weak identification. Because the substance of the hearsay clearly implicated defendant as the shooter, and the evidence was close, the outcome of the trial could have been affected.

People v. Crump, 319 Ill.App.3d 538, 745 N.E.2d 692 (3d Dist. 2001) The trial judge erred by admitting the investigating officer's opinion concerning probable cause to believe defendant committed the offense. The court rejected the argument that the officer's testimony was admissible under 725 ILCS 5/115-12, which authorizes a hearsay exception for statements of identification where the declarant testifies at trial and is subject to cross-examination.

Section 115-12 creates an exception to the hearsay rule - the State conceded that the officer's statement was not hearsay. Furthermore, had the statement been hearsay, §115-12 would have been inapplicable because the statement did not concern identification of a person.

People v. Gonzalez, 292 Ill.App.3d 280, 685 N.E.2d 661 (2d Dist. 1997) Noting a conflict in authority, the Appellate Court concluded that §115-12 was intended to admit out-of-court statements of identification even where the declarant could not identify the defendant at trial. Although precedent on the question is conflicting, "sound public policy" supports the practice of admitting reliable identifications made at the time of an offense, even where the identification cannot be repeated at trial.

People v. Arteman, 150 Ill.App.3d 750, 502 N.E.2d 85 (4th Dist. 1986) A State's witness who identified the defendant in court was properly allowed to testify that he recognized the defendant in the hallway earlier that day, and that he told this to the prosecutor.

§19-18
Testimony From Prior Proceedings

United States Supreme Court

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) Where "testimonial" hearsay is to be offered into evidence at a criminal trial, the Sixth Amendment requires a showing that: (1)the witness is unavailable, and (2) the defendant had a prior opportunity to cross-examine the declarant concerning the testimony. Ohio v. Roberts, 438 U.S. 56 (1980), erred by suggesting that the Confrontation Clause can be satisfied by the trial court's finding that testimonial hearsay is reliable; although the Confrontation Clause is intended to insure that evidence is reliable, such reliability is assessed in only one way - "by testing in the crucible of cross-examination."

"Testimonial" statements include, at a minium, testimony at a preliminary hearing, before a grand jury or at a previous trial, and statements made in response to police questioning. Equivalent statements (such as affidavits and depositions), as well as statements which a reasonable declarant would believe might be used by the prosecution at trial, may also be "testimonial."

California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) Where defendant was represented by counsel and had an opportunity to cross-examine the witness at

preliminary hearing, the preliminary hearing testimony was admissible at trial when the witness became unavailable.

Illinois Supreme Court

People v. Torres, 2012 IL 111302 The State sought to admit at defendant's trial the preliminary hearing testimony of an occurrence witness. The State alleged that the witness was unavailable because he had been deported to Mexico more than 20 years prior. Simply establishing the fact of deportation may not be enough to establish the witness's unavailability. But since the parties agreed that the witness had been deported, and the defense conceded that the requirement of unavailability had been met, the court concluded that the defense forfeited any challenge to the unavailability of the declarant.

Defendant had not been afforded an adequate opportunity to cross-examine the witness at the preliminary hearing, however, and therefore the former testimony was inadmissible. At that hearing, counsel was not privy to inconsistent statements that the witness had given to the police that might have been used to confront the witness and induce further changes in the witness's version of the events. Counsel also was unaware of the status of the witness as an alien, or the circumstances of his departure from the United States, all of which might have been relevant to a motive of the witness to curry favor with the State.

The preliminary hearing court also placed restrictions—overt and covert—on defense counsel's cross-examination. Remarks that the court made at the start of the hearing evinced that the court was not enthusiastic about proceeding immediately with the hearing. Two objections that the court sustained when defense counsel attempted to probe for possible bias and prejudice of the witness also appeared to send "the message to counsel to wrap it up, and counsel did just that. We think it clear from the record that counsel would have done more with the witness at the preliminary hearing if he had felt free to do so."

The error in the admission of the preliminary hearing testimony of the witness was not harmless as his testimony was the only trial evidence placing defendant inside the bar where the shooting occurred at or near the time of the shooting.

People v. Sutherland, 223 Ill.2d 187, 860 N.E.2d 178 (2006) An opportunity to cross-examine is meaningful and adequate where the motive and focus of the cross-examination at the initial proceeding is the same or similar to that which would guide cross-examination at the subsequent proceeding. The court concluded that where a crime scene technician who was deceased at the time of defendant's second trial had testified at the first trial, the motive and focus of cross-examination would have been the same at both trials. Thus, the trial court did not err by admitting the testimony from the first trial.

The court rejected the argument that the testimony should have been excluded because defense counsel failed to conduct adequate cross-examination at the first trial; defendant "cites no case law holding that prior testimony of a deceased witness will only be admitted where ample opportunity to cross-examine existed and such opportunity was fully and effectively utilized."

The court also rejected the argument that defendant lacked an ample opportunity to cross-examine at the first trial because that conviction was reversed due to ineffective assistance of counsel. "Two specific instances of ineffective assistance [relating to investigation and presentation of evidence] do not render prior counsel's conduct throughout the trial deficient."

People v. Patterson, 217 Ill.2d 407, 841 N.E.2d 889 (2005) **Crawford v. Washington**, 541 U.S. 36 (2004), was violated when the grand jury testimony of a witness who refused to testify

at defendant's trial was read to the jury. The testimony was admitted under 725 ILCS 5/115-10.2, which authorizes the admission of hearsay statements by a declarant who refuses to testify despite a court order. Such testimony can be admitted only if: (1) the hearsay is offered on a material point, (2) the hearsay is more probative on that point than any other evidence which is reasonably available, (3) the hearsay has equivalent circumstantial guarantees of trustworthiness as traditional hearsay exceptions, and (4) the interests of justice will be served by admitting the statement.

However, Crawford error is subject to harmless error analysis. The court rejected the argument that violations of the Confrontation Clause constitute structural error that is not subject to the harmless error rule.

Here, the error was harmless beyond a reasonable doubt. The error could not have contributed to the conviction where the grand jury testimony was consistent with the defendant's testimony on several points, there was evidence to corroborate the grand jury testimony concerning points on which it contradicted defendant's testimony, and the evidence of guilt was overwhelming. The court also rejected defendant's argument that he would not have testified had the grand jury testimony been excluded, finding that such an assertion was mere speculation.

People v. Horton, 65 Ill.2d 413, 358 N.E.2d 1121 (1976) The testimony of a witness at a preliminary hearing is admissible at trial when the witness is unavailable, without fault on the part of the State, and ample opportunity to cross-examine existed at the preliminary hearing. Whether there was "ample opportunity to cross-examine" at the preliminary hearing must be decided upon the circumstances of each case. "Ample opportunity to cross-examine" means an opportunity to "effectively" cross-examine; merely providing an opportunity to cross-examine at the preliminary hearing is not per se "adequate" in light of the absence of discovery and the limited nature of the evidence which may be introduced at a preliminary hearing. See also, People v. Rice, 166 Ill.2d 35, 651 N.E.2d 1083 (1995) (State did not have an adequate opportunity to cross-examine declarant at suppression hearing in the declarant's case where the issues involved at that hearing were substantially different from those involved when the declarant refused to testify at defendant's trial).

Illinois Appellate Court

People v. Diggs, 2023 IL App (1st) 220955 Defendant was convicted of first degree murder in 2003 but in 2019 was granted a new trial. The new trial order followed post-conviction proceedings predicated on a claim of actual innocence after two formerly unknown individuals confessed to committing the offense. In anticipation of defendant's retrial, the State filed a motion *in limine* to admit the prior testimony of a now-deceased eyewitness from defendant's original trial, relying on Illinois Rule of Evidence 804(b)(1), 725 ILCS 5/115-10.4, and the confrontation clause. The court denied the State's motion, and the State appealed under Illinois Supreme Court Rule 604(a)(1).

The appellate court held that the trial court did not abuse its discretion in denying the State's motion. Under the confrontation clause, testimony from a prior proceeding may be admissible if two conditions are met: (1) the witness from the prior proceeding is unavailable at trial, and (2) the defendant previously had an adequate opportunity to cross-examine the witness. An adequate opportunity for cross-examination means an opportunity that was meaningful and effective; it is not enough that defendant merely was *able* to cross-examine the witness. In determining whether defendant had an opportunity for meaningful cross-examination, a court should look to whether the focus and motive of the prior cross-examination was the same or similar to what it would be during the current proceeding.

Additionally, a court should consider whether the prior cross-examination was limited in any manner, what counsel knew when conducting the original cross-examination, and whether the unavailable witness's prior testimony is cumulative of the testimony of other witnesses.

Rule 804(b)(1) and section 115-10.4 provide a framework for admitting the prior testimony of a witness who is now deceased. While that framework differs under each in some respects, both the rule and the statute require that the unavailable witness's prior testimony have been subject to adequate cross-examination.

Here, defendant's opportunity for cross-examination of the witness, Keyth Ann Essie, at his original trial was insufficient to allow admission of her prior testimony at his retrial. At defendant's first trial, Essie testified that she witnessed the murder and identified defendant as the shooter. Defense counsel's cross-examination of Essie primarily focused on her history of drug use and her consumption of alcohol on the date of the shooting. Given the newly discovered confessions of two previously unknown individuals which formed the basis for granting defendant a new trial, the court did not abuse its discretion in finding that defendant's prior opportunity for cross-examination was not meaningful or effective.

Defense counsel's prior cross-examination of Essie was not limited by the court in any manner, and counsel had the benefit of full discovery prior to trial. But, counsel was not able to question Essie about whether she knew, or had any relationship with, the two men who had subsequently confessed to the crime because that information had not been available at the first trial. Had counsel known about these two individuals and their confessions, it would have opened an entirely new line of questioning for cross-examination. Accordingly, defendant did not have an adequate opportunity for cross-examination of Essie at his original trial, and thus the trial court did not abuse its discretion in denying the State's request to admit her prior testimony on retrial.

People v. Broches, 2022 IL App (2d) 200001 A transcript from a defendant's prior guilty plea hearing, used for the limited other-crimes purposes of proving identity and *modus operandi*, is admissible as both a public record under Illinois Rule of Evidence 803(8), and as a certified record under Rule 902(4). Furthermore, the contents of the report were not hearsay, because the factual basis of defendant's prior plea constituted an admission of a party-opponent.

People v. Sanders, 2021 IL App (5th) 180339 At defendant's second trial for first degree murder, it was error for the trial court to allow the State to introduce as substantive evidence a transcript of defendant's testimony from his first trial which ended in a mistrial. During his prior testimony, defendant was impeached with inculpatory statements that the court had excluded as substantive evidence based on violations of **Miranda**, the Fifth Amendment, and due process.

The State introduced the prior testimony and impeachment during its case in chief at the second trial, and defendant did not testify. The Appellate Court first noted that at least some of the original impeachment had been improper because a portion of defendant's prior statements were deemed involuntary. The court went on to hold that, regardless, the prior use of the statements for impeachment purposes did not render them admissible substantively at the second trial.

The court also rejected the argument that defendant's prior testimony, including the impeachment, was admissible under the Illinois Rules of Evidence, specifically Rule 801(d)(2)(A), which excepts statements made under oath while testifying from exclusion as hearsay. The court clarified that the Rules of Evidence do not trump the exclusionary rule.

Rule 801(d)(2)(A) could not be used to override the court's suppression order regarding the inculpatory statements that had been allowed as impeachment-only at the prior trial.

People v. Kent, 2020 IL App (2d) 180887 The trial court erred when it found a State witness "unavailable" under Rule of Evidence 804(a)(5) (declarant absent and proponent unable to procure presence by process or other reasonable means), and admitted a transcript of the witnesses' prior testimony at defendant's retrial under 804(b)(1). The State admitted that they had spoken to the witnesses' family, but averred that his father was hostile and the witness avoided service. The State informed the court that it attempted to serve the witness at times the family was home, but that he and his family refused to open the door.

The Appellate Court held the trial court abused its discretion when it found the State made a reasonable attempt to obtain the witnesses' presence. The State described only two attempts to serve the witness, and never represented to the court that further attempts would be futile. On the contrary, the State had admitted it would continue to attempt to serve the witness. But it never asked for a continuance to do so. And it failed to clarify whether it had tried to find the witness anywhere other than his home. Furthermore, the State's representations to the court about its efforts were not in the form of affidavit or sworn testimony, as is required by common law.

The error was of constitutional magnitude as it resulted in a violation of defendant's right to confrontation. The State therefore had the burden of proving the error harmless beyond a reasonable doubt. Because the witness in question provided the sole eyewitness identification of the offense, and without it the State had only a circumstantial case against defendant, the error was not harmless.

People v. Lard, 2013 IL App (1st) 110836 The confrontation clause does not require that counsel have an opportunity at the preliminary hearing to ask about every fact that might be relevant at trial. Thus, the opportunity to cross-examine may have been adequate at the earlier hearing even where discovery materials disclose new information which is relevant to cross-examination. What matters is that at the preliminary hearing defense counsel had a "fair opportunity" to inquire into the witness's observation, interest, bias, prejudice, and motive. Furthermore, to the extent that a witness at the preliminary hearing testifies to facts showing probable cause to believe that the defendant committed an offense, the defense has a motive to test the witness's credibility, powers of observation, and ability to recall.

Because defense counsel cross-examined the officer at the preliminary hearing and asked about his powers of observation and recall, just as would have been done at trial, the court concluded that the preliminary hearing testimony was properly admitted. Although at trial the defense had access to discovery that had not been available at the prior hearing, defendant did not show how he would have benefitted from additional cross-examination based on information gleaned from the discovery.

The court also rejected the argument that cross-examination was limited at the preliminary hearing because defense counsel represented both defendant and a co-defendant. Defendant presented no evidence that the co-defendants had antagonistic defenses or that counsel was concerned that questioning which would have benefitted one defendant would have hurt the other.

People v. Starks, 2012 IL App (2d) 110273 The trial court did not abuse its discretion by excluding the prior testimony of a deceased complainant. At the original trial for aggravated criminal sexual assault, aggravated battery, and unlawful restraint, the complainant testified that she had been raped by the defendant. Serology testing on the complainant's

underwear and vaginal swab disclosed the presence of semen, and the State's expert testified that defendant could not be excluded as the source. During post-conviction proceedings, new DNA testing excluded defendant as the source of the semen. In addition, the new testing showed that despite the State expert's testimony at the original trial, the earlier testing excluded defendant as the source of the semen. A new trial was ordered as a result of the post-conviction proceedings.

At the new trial, the State moved to admit the prior testimony of the complainant, who had died since the first trial. The trial court denied the motion.

The Appellate Court held that defendant did not have an adequate opportunity and motive to cross-examine the complainant at the original trial. Not only was defendant falsely informed that he could not be excluded as the source of the semen, but due to the erroneous application of the rape shield statute he was not permitted to ask the complainant whether she had sexual intercourse with anyone else around the time of the alleged offense. The court concluded that the inability to question the complainant about her prior sexual contacts and the exculpatory scientific evidence "precluded defendant from exposing facts from which the fact finder could have drawn inferences about complainant's reliability and credibility."

The court rejected the State's argument that if the jury found that defendant did not have sexual intercourse with the complainant, the prior testimony would be relevant to whether the defendant committed attempted aggravated criminal sexual assault. The court found that the inability to cross-examine the complainant about evidence concerning her credibility affected all of the charges, not merely those relating to sexual intercourse.

The court found that the absence of an adequate opportunity and motive to cross-examine the complainant precludes the admission of the prior testimony under either §115-10.4 or Illinois Rule of Evidence 804(b)(1). The trial court's order barring the admission of the prior testimony was affirmed.

People v. Brown, 374 Ill.App.3d 726, 870 N.E.2d 1033 (1st Dist. 2007) Where the prosecutor called a witness at a bond revocation hearing and elicited broad testimony concerning the circumstances of the offense, defense counsel's motive to cross-examine was not the same as it would have been when the State sought to introduce the testimony at a trial for aggravated kidnapping and battery. "[T]he issues at the bond hearing differed significantly from the issues at trial."

The court rejected the argument that the trial judge "changed the motive for cross-examination at the bond hearing" where, in response to the prosecutor's question whether counsel was "waiving his right to conduct a meaningful cross," the judge directed defense counsel to recall the witness and conduct a full cross-examination. By compelling defense counsel to recall and cross-examine the witness, the trial court transformed the bond hearing into an evidentiary disposition without compliance with Supreme Court Rules, which mandate 21 days notice and a showing of "certain specified grounds for the exceptional procedure." The "attempt to convert the bond hearing to an evidentiary deposition did not change defense counsel's basic motivation at the hearing," because the issues at the bond hearing were substantially different than those which would arise at trial. Because counsel did not have an adequate opportunity for cross-examination, the testimony did not have sufficient guarantees of trustworthiness to make it admissible under §115-10.4.

People v. Purcell, 364 Ill.App.3d 283, 846 N.E.2d 203 (2d Dist. 2006) Testimony which a deceased witness gave before a grand jury should have been excluded under Crawford. At the time of trial, 725 ILCS 5/115-10.4 provided that prior testimony by a deceased witness is admissible if the interests of justice will be served and the statement: (1) has guarantees of

trustworthiness equivalent to those accompanying statements which qualify for hearsay exceptions, (2) is offered as evidence of a material fact, and (3) is more probative on the point for which it is offered than any other evidence which can reasonably be obtained. (P.A. 94-53 (eff. 6/17/05) amended §115-10.4 to require that the prior statement must have been subject to cross-examination.) Because grand jury testimony is clearly "testimonial," the statements should have been excluded because defendant did not have an opportunity for cross-examination.

However, that in view of the overwhelming evidence of guilt and the cumulative nature of the hearsay, the Crawford error was harmless beyond a reasonable doubt.

People v. Tokich, 314 Ill.App.3d 1070, 734 N.E.2d 117 (4th Dist. 2000) Supreme Court Rule 414(a) provides that if it appears "that the deposition of any person other than the defendant is necessary for the preservation of relevant testimony because of the substantial possibility it would be unavailable at the time of hearing or trial," the court may order the taking of a deposition "for use as evidence at a hearing or trial." The trial judge did not err by allowing the State to present the videotaped deposition of a detective who, at the time of defendant's trial, was in China to adopt a child.

Rule 414 was intended to strike a balance between the need to preserve evidence and a criminal defendant's right to have witnesses testify before the jury. Live testimony should be the rule, and exceptions are allowed only under special circumstances. The trial court did not abuse its discretion by admitting the videotaped deposition - the detective's absence was not merely for his own convenience, and he would have lost the opportunity to adopt the child had he changed his travel plans in order to attend defendant's trial.

People v. Wilkerson, 123 Ill.App.3d 527, 463 N.E.2d 139 (4th Dist. 1984) A witness's previous testimony may be admitted into evidence at a trial, as an exception to the hearsay rule, if the witness has become unavailable and the current opponent of the evidence had the opportunity to cross-examine the witness at the earlier hearing.

In addition, a defendant's testimony at trial may properly be introduced against him at a later trial.

§19-19
Statements Against Penal Interest

United States Supreme Court
Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) Under a rule adopted by the South Carolina Supreme Court, defense evidence showing that someone other than the defendant committed the crime is admissible if it raises a reasonable inference of the defendant's innocence. Such evidence is inadmissible, however, if it merely casts suspicion on another or raises a "conjectural inference" of a third party's guilt. In this case, the South Carolina Supreme Court interpreted the rule as precluding defense evidence of third party guilt if the State has strong forensic evidence of the defendant's guilt.

The Supreme Court concluded that the South Carolina rule violates the constitutional right to present a defense, because it excludes evidence of third party guilt based solely on the strength of the prosecution's case, even if the defense evidence has great probative value and does not cause harassment, prejudice or confusion of the issues. In addition, the court criticized the South Carolina rule because it took the prosecution's evidence at face value, without examining credibility or reliability.

The court stressed that the South Carolina rule was not rationally related to its intended purpose - to focus the trial on central issues by excluding evidence which has only a weak logical connection to those issues. "The rule applied in this case is no more logical than its converse would be, i.e., a rule barring the prosecution from introducing evidence of a defendant's guilt if the defendant is able to proffer, at a pretrial hearing, evidence that, if believed, strongly supports a verdict of not guilty."

Williamson v. U.S., 512 U.S. 594, 129 L.Ed.2d 476, 114 S.Ct. 2431 (1994) The declaration against interest exception (Federal Rule of Evidence 804(b)(3)) allows admission of only that portion of a statement that is actually against the declarant's interest. The exception is based on the assumption that inculpatory statements are reliable; non-inculpatory statements are not reliable merely because they are made "within a broader narrative that is generally self-inculpatory."

Because the trial court erroneously admitted portions of an accomplice's statement that implicated only the defendant (and not the accomplice), the Supreme Court remanded the cause for a new trial.

Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) A State hearsay rule that did not recognize a penal interest exception could not be applied mechanistically to exclude evidence that a third party had confessed to the crime. The third party confession was made under circumstances that "provided considerable assurance" of its reliability, was made spontaneously to a close acquaintance shortly after the crime and was corroborated by other evidence. In addition, the statements were unquestionably against the declarant's interests, and the declarant was under oath in court and could have been cross-examined.

Illinois Supreme Court

People v. Tenney, 205 Ill.2d 411, 793 N.E.2d 571 (2002) A statement exculpating the defendant and admitting the declarant's participation in the offense was sufficiently reliable to be admitted. First, the declarant's statement was self-incriminating and against his penal interest; because the declarant said he participated in the home invasion with which defendant was charged, "[n]o credible argument could be made that making that declaration was not against his penal interest."

The second **Chambers** factor - whether the statement was corroborated - was also satisfied. The court stated that where the sufficiency of the corroborating evidence is a close question, the judge should admit the statement and rely on the jury to correct any prejudicial impact.

Two **Chambers** factors - that the statement was made spontaneously to a close acquaintance shortly after the offense and that the declarant was available for cross-examination - were not present. The State must have regarded the statement as reliable, however, because it introduced it at a trial of the declarant. "[I]f a confession is sturdy enough for the State to use in its own case - if it is the sort of evidence that prosecutors regularly use against defendants - then defendants are entitled to use it for their own purposes." Compare People v. Williams, 193 Ill.2d 1, 737 N.E.2d 230 (2000) (statement identifying shooter was not sufficiently reliable to be admitted where it exculpated the declarant of primary involvement in the offense and was uncorroborated; in addition, the declarant had previously identified two persons who were exonerated by police).

People v. Thomas, 171 Ill.2d 207, 664 N.E.2d 76 (1996) The trial court did not err by excluding defendant's court-reported, post-arrest statement, in which he admitted firing the weapon that killed the decedent but claimed there were extenuating circumstances. The Court noted that the only **Chambers** factor present was that the statement was against the declarant's interest. On the other hand, the statement was made to authorities rather than to a close acquaintance, there was no corroboration of defendant's claims of self-defense or involuntary manslaughter, and the State had no opportunity for cross-examination (since the statement was not made under oath and was not part of an adversarial trial process). But see, People v. Kokoraleis, 149 Ill.App.3d 1000, 501 N.E.2d 207 (2d Dist. 1986) (statements made to police officers while declarants were in custody had assurance of reliability; statements were made to law enforcement personnel, were corroborated by other evidence, and were incriminatory; in addition, neither declarant stood to benefit by disclosing his role in the offenses, and both "must have been aware of the possibility that disclosure would lead to criminal prosecution"; although neither declarant was available to testify, finding of reliability does not require all four Chambers factors).

People v. Rice, 166 Ill.2d 35, 651 N.E.2d 1083 (1995) The co-defendant's testimony at his suppression hearing, in which he admitted that he alone possessed the substance that defendant was charged with possessing, was not admissible as a statement against penal interest. The Court declined to decide whether the admissibility of declarations against penal interest should be decided under Federal Rule of Evidence 804 or under Chambers v. Mississippi, 410 U.S. 284 (1973). Both Rule 804 and **Chambers** require that the circumstances surrounding the statement establish reliability; the Court concluded even if all the other requirements for admission were satisfied, there were insufficient indicia of reliability to justify admission of the statements.

The Court stressed that the co-defendant's testimony was not a spontaneous statement and was not subjected to contemporaneous cross-examination on the points relating to the defendant. In addition, the witness had a motive to testify falsely to obtain a favorable ruling on his motion to suppress, and there was absolutely no evidence to corroborate his claims exculpating the defendant. Under these circumstances, there was insufficient evidence of reliability to justify admission under either the Federal Rules of Evidence or **Chambers**.

People v. Cruz, 162 Ill.2d 314, 643 N.E.2d 636 (1994) At defendant's trial for kidnapping, rape and murder, the defense introduced several statements by Brian Dugan, who had confessed to committing the crimes with which defendant was charged. However, the trial court refused to admit details of several other crimes to which Dugan also confessed. Defendant claimed that the details of the statements would have shown that the offense here fit Dugan's modus operandi and that Dugan's confession to this offense was reliable.

On appeal, defendant claimed that the details of the other crimes should have been admitted not only to show modus operandi, but also to corroborate Dugan's claim that he had acted alone in committing this offense. In response, the State claimed that Dugan's statements were erroneously admitted because they were not against his penal interest, and that the admissibility of corroborating evidence was therefore irrelevant.

The Supreme Court held that Dugan's statements to these offenses were against Dugan's penal interest, and therefore were not inadmissible hearsay. Although the statements were made during plea negotiations and on the condition they could not be used against Dugan, the information conveyed could have led the police to admissible evidence.

Thus, the statements, even if not admissible themselves, were against Dugan's penal interests because they subjected him to the possibility of prosecution and a death sentence.

In addition, the fact that Dugan made the statements during plea negotiations did not mean that they ceased to be against his penal interest, but only that they could not be introduced in a prosecution against him.

People v. Bowel, 111 Ill.2d 58, 488 N.E.2d 995 (1986) At defendant's trial for robbery, he called his father and a friend, who both testified that a man named Cooley told them that he (and not the defendant) had committed the offense. The defendant also sought to call a man named Howard as a witness. Howard would have testified that he overheard a conversation between Cooley and the defendant, during which Cooley admitted committing the offense. The trial judge refused to allow Howard's testimony.

After reviewing the law concerning the introduction of statements against penal interest, the court held that the trial court did not abuse its discretion.

1. In **Chambers v. Mississippi,** 410 U.S. 284 (1973), the statement against penal interest exception to the hearsay rule enabled the defendant to introduce evidence of a third party's confession to the crime with which the defendant was charged. In Chambers, the third party confession had "sufficient indicia of trustworthiness" because: (1) it was made spontaneously to a close acquaintance shortly after the crime, (2) it was corroborated by other evidence, (3) it was self-incriminating and against the declarant's interest, and (4) there was adequate opportunity for cross-examination.

The Supreme Court rejected the State's argument that all of the factors set out in Chambers are required for a statement against penal interest to be admitted. The **Chambers** factors are to be regarded simply as indicia of trustworthiness, not as requirements for admission. The question to be considered "is whether the declaration was made under circumstances that provide 'considerable assurance' of its reliability by objective indicia of trustworthiness."

The determination of reliability is to be made by the trial judge, whose ruling should be reversed only upon a clear showing of abuse of discretion.

2. Here, the trial court did not abuse its discretion by excluding Howard's testimony. The Court pointed to several factors: (1) Howard was not a party to the conversation, but only overheard it, (2) Howard was walking back and forth during the conversation, and it was not clear how far away he was or whether he heard all or only part of the conversation, and (3) the declarant could not be found, and thus was not available for cross-examination by the State. The Court also noted that Howard's testimony would have been substantially the same as that of the two defense witnesses who were allowed to testify about statements Cooley made to them.

People v. Tate, 87 Ill.2d 134, 429 N.E.2d 470 (1981) Declarations against penal interest are admissible only if there are objective indicia of the trustworthiness of the declarations. Such indicia of reliability were not present where, although the alleged statement was self-incriminating and there was an opportunity for cross-examination, the alleged statement was two months after the crime rather than shortly thereafter. In addition, there was no independent corroboration; although the declarant confirmed that a conversation took place with the defense witness, he did not corroborate the contents of the conversation.

Illinois Appellate Court

People v. Colone, 2024 IL App (1st) 230520 Defendant was convicted of two counts of murder and sentenced to two consecutive terms of 25 years in prison. On appeal, he argued

that the trial court erred in denying his motion to bar a rap video he posted to Facebook Live. According to defendant, this rap video was not relevant to the case and was highly prejudicial, because it discussed gang life, shooting, drug use, and drug sales.

Citing **People v. Bush**, 2023 IL 128747, the appellate court determined that the rap video here bore a "strong nexus" to the facts of the case, making it relevant, with probative value that outweighed any prejudice. Defendant posted the video two months after the double murder, and in it he references a shooting of multiple people, the co-defendant, and the subject's refusal to use his guns, which was consistent with evidence that defendant was angry with the victims for owning guns but not joining in their gang war. The lyrics made several other references linked to the facts of the case. The trial court therefore did not abuse its discretion.

Nor was counsel ineffective for failing to object to the State's inclusion of a transcription with the video. Defendant argued that his counsel should have objected to the foundation and pointed out that some of the lyrics in the transcription sound incorrect. But a foundation objection could have been easily cured, and the errors identified by defendant were not material. Finally, the jury was instructed with IPI 3.20, which explains that transcriptions are merely what the transcriber believes was said, and the jury should primarily consider the recording itself. Thus, defendant could not show prejudice.

People v. Cross, 2021 IL App (4th) 190114 The circuit court did not abuse its discretion when it precluded defendant from introducing an alleged third-party admission. Defendant argued that a man named Gardner took credit for the killing in a rap video. The Appellate Court affirmed after analyzing the evidence under the factors outlined in **Chambers v. Mississippi**, 410 U.S. 284 (1973).

The statements were made three months after the shooting and posted online. Therefore, they were not made spontaneously to a close acquaintance shortly after the crime occurred. Second, they lacked substantial corroboration aside from defendant and his girlfriend's testimony that Gardner drove the vehicle used in the shooting, which the Appellate Court found "too vague" to corroborate the confession. The statements were also not sufficiently self-incriminating because the lyrics did not explicitly take credit for the offense and the phrase "had to hunt him down" never actually states that Gardner himself did so. The court noted that, regardless, hip hop lyrics often describe or take credit for crimes the artist had no actual involvement in, and thus any admission contained in a rap video would have little probative value. Finally, there was no opportunity to cross-examine Gardner because he was shot and killed before trial. Thus, the statement was properly excluded.

Finally, citing only a similar complaint in its own prior opinion, the court bemoaned appellants' tendency to "constitutionalize" evidentiary issues by claiming the exclusion of defense evidence violates the defendant's due process right to present a defense. The court found the claim "adds only clutter to whatever legitimate arguments he may have on appeal."

People v. Alexander, 2020 IL App (3d) 170829 The Appellate Court remanded for appointment of new counsel and the filing of new post-trial motions, where defendant's *pro se* post-trial claim of ineffectiveness showed possible neglect.

Prior to trial, the State had moved to bar the testimony of two witnesses who would testify that a third party, Ricky, admitted to committing the aggravated battery for which defendant was on trial. The court granted the State's motion, finding the testimony was hearsay. After his conviction, defendant filed a *pro se* post-trial motion alleging trial counsel's

ineffectiveness for failing to seek admission of a recorded phone call in which Ricky admitted to the offense. Asked by the court if counsel was aware of this recording, counsel stated he was, but that he heard about it "late" and didn't want to ask for a continuance. The Appellate Court found potential neglect of the case and remanded for a hearing on whether counsel was ineffective for failing to move to admit the recording. Although not necessarily admissible, it could at least support an argument that the third-party admission was sufficiently reliable for use at trial, and therefore the defendant met the "potential neglect" standard.

The Appellate Court found further possible neglect in the counsel's failure to object to a video of the victim in the hospital. The video was introduced to show the victim's identification of defendant in a photo array presented by a detective. This identification had already been introduced through the testimony of both the victim and the detective, so it had little probative value. In the course of the video, a doctor entered and could be heard explaining to defendant the need for a catheter as a result of his having been shot in the penis, and that immediate action was required to avoid insertion of a metal rod to save his urethra. Defendant's post-trial motion showed defense counsel potentially neglected his case by failing object to the video as substantially more prejudicial than probative under Rule 403.

People v. Rebollar-Vergara, 2019 IL App (2d) 140871 At defendant's murder trial, evidence showed that on the night of the offense he and Garcia left a party and went to a convenience store. Defendant was a former Latin King, and thought Garcia was a Latin King, but he did not know him very well. They encountered the victim, a suspected rival, argued with him, and followed him out of the store. Defendant intended to fight him, and did not know Garcia was armed. Suddenly, Garcia shot and killed the victim. Garcia confessed, stating that he alone shot the victim, and that defendant should not be charged with murder. The defense moved to admit Garcia's statement that defendant should not be charged, but the trial court denied the request.

The Appellate Court affirmed, finding that the statement met only one **Chambers** factor – it was made shortly after the offense. The court found the statement was not corroborated, because surveillance video showed defendant walking side-by-side with Garcia during the shooting. The statement was not self-incriminating, because whether defendant was charged or not did not bear on Garcia's guilt. The statement lacked trustworthiness given Garcia's incentive to protect a member of his gang and his later recantation his confession.

People v. Wright, 2017 IL 119561 Declarations against penal interest are an exception to the hearsay rule. An out-of-court statement is admissible if: (1) the declarant is unavailable; (2) the statement tends to subject him to civil or criminal liability; and (3) the statement is corroborated by circumstances that clearly indicate its trustworthiness. Ill. R. Evid. 804(b)(3). A declarant who properly asserts his Fifth Amendment right not to testify is unavailable for purposes of this rule.

Defendant, who represented himself during trial, made an offer of proof during the State's case in chief that a detective would testify that codefendant said he committed the robbery with a BB gun. When defendant attempted to elicit codefendant's statement during cross-examination of the detective, the trial court sustained the State's objection. Later, at a hearing outside the jury's presence, codefendant invoked his right not to testify. But following this invocation, defendant never attempted to call the detective to elicit the statement.

The Supreme Court held that since defendant never made an attempt to elicit the statement at trial following codefendant's invocation of his right to silence, the trial court did not err in excluding the evidence. Although the court recognized that this failure may have occurred because defendant was *pro se*, once he made the decision to represent himself he

was held to the same standards as an attorney and could not complain about his lack of competency on appeal.

People v. McCullough, 2015 IL App (2d) 121364 Under Illinois Rule of Evidence 804(b)(3), an out-of-court statement that would subject a person to civil or criminal liability is admissible. Three conditions must be met before the statement can be admitted: (1) the declarant must be unavailable; (2) the statement must be against the declarant's penal interest; and (3) the trustworthiness of the statement must be corroborated.

The trial court admitted the 1994 deathbed statement of defendant's mother that defendant "did it." The trial court agreed with the State's theory that the statement was against her penal interest since it showed that she had lied in 1957 when she told the FBI that defendant was at home at the time of the offense, and hence was subject to possible prosecution for obstruction of justice.

The Appellate Court held that the trial court erred in admitting the statement since it was not against the mother's penal interest. The court held that the statement itself must on its face be self-incriminating. The mother's statement, however, did not on its face incriminate her. Instead, to be incriminating, the State would have needed to introduce the inadmissible hearsay statement of what the mother told the FBI in 1957 and then speculate that (1) the State could have prosecuted her for obstruction of justice 37 years later as she lay dying of cancer, and (2) that she would have waived any statute of limitations bar.

Although the Appellate Court held that the statement should not have been admitted, it affirmed defendant's conviction on harmless error grounds.

People v. Garcia, 2012 IL App (2d) 100656 It is within the trial court's discretion to determine whether evidence is relevant and admissible and the trial court's decision on the issue will not be reversed absent an abuse of discretion.

The police found cocaine and cannabis in defendant's car after a traffic stop. The trial court did not abuse its discretion in excluding evidence that defendant's passenger pleaded guilty to a lesser charge of cocaine possession. The State's theory was that defendant and his passenger jointly possessed the drugs and the passenger's admission did not establish his exclusive possession of the drugs or rule out joint possession with defendant.

Citing Ill. R. Evid. 804(b)(3), the Appellate Court also concluded that evidence of the plea could not be admitted as a statement against penal interest, because that hearsay exception applies only when the declarant is unavailable as defined by Ill. R. Evid. 804(a). Defendant failed to demonstrate any of the bases for deeming a witness unavailable under §804(a).

The court affirmed defendant's conviction.

McLauren, J., dissented.

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence.

While not conclusive or dispositive on the issue of possession, the guilty plea was relevant. It would have bolstered defendant's credibility when he said that the drugs were his passenger's "in that it would have taken much of the sting out of the idea that defendant was just looking for the most convenient person to blame. Furthermore, it weighs heavily against the simplest theory of events: defendant's truck, defendant's drugs, [the passenger's] bad luck." The case was credibility driven. Evidence of the passenger's guilty plea would have required the jury to actually consider the issue of joint possession and could have materially

affected the verdict. It would not have been unduly prejudicial to the State because it claimed that the possession was joint.

People v. Wilcox, 407 Ill.App.3d 151, 941 N.E.2d 461 (1st Dist. 2010) An out-of-court statement offered to establish the truth of the matter asserted is hearsay and is generally inadmissible. However, in the interests of justice, an out-of-court statement which is against the declarant's penal interest is admissible if there are sufficient *indicia* of trustworthiness. Factors considered in determining whether an out-of-court statement is sufficiently trustworthy to be admitted include whether: (1) the statement was made spontaneously to a close acquaintance shortly after the crime; (2) the statement is corroborated by other evidence; (3) the statement was self-incriminating and against the declarant's penal interest; and (4) there is an adequate opportunity to cross-examine the declarant. These four factors are merely guidelines; all four need not be present for a statement to be admitted. The primary consideration is whether the statement was made under circumstances which provide objective *indicia* of trustworthiness.

Where a witness provided the defense with a signed statement in which he said a third person admitted shooting the decedent, the trial court erred by finding that the statement was insufficiently reliable to be admitted. The parties agreed that the statement was self-incriminating and against the declarant's penal interest, and that the declarant was available for cross-examination. Thus, the third and fourth factors were satisfied.

Furthermore, the first factor was satisfied because the statement was made spontaneously to a close acquaintance shortly after the shooting in question. Although the record did not show the relationship between the declarant and the witness who gave the signed statement, defense counsel informed the court that if the witness was permitted to testify he would state that he and the declarant were active members of the same gang and knew each other well enough that the declarant knew where to find the witness at a particular time.

The second factor requires that the statement be sufficiently corroborated to show that it was reliable. Under Illinois law, only "some" corroborating evidence need be present. The trial court should admit the statement if the question of corroborating evidence is close.

The court found that sufficient corroboration was present. First, the declarant's description of the shooting was corroborated by expert testimony concerning the decedent's wounds. Second, the statement was consistent with the trial testimony except the testimony which identified defendant as the shooter, which the defense claimed was fabricated and which the third party statement directly rebutted.

Because the third party's statement was sufficiently reliable to be admitted, the trial court abused its discretion by granting the State's motion *in limine* and barring the statement. Defendant's convictions were reversed and the cause remanded for a new trial.

People v. Gray, 378 Ill.App.3d 701, 883 N.E.2d 546 (4th Dist. 2008) A codefendant's confession was sufficiently reliable to be admitted at defendant's trial.

1. Although the State had no opportunity for cross-examination in light of the co-defendant's refusal to testify when called at defendant's trial, the police were able to thoroughly question the co-defendant when he gave the statement exculpating the defendant. In addition, the State chose to try defendant first, although the co-defendant's statement would have been admissible against him whether he was tried first or second, and the co-defendant testified at his own trial, meaning that his testimony would have been admissible at defendant's trial had the order of the trials been reversed. Thus, "the State may have gained some advantage" by electing to try the defendant first.

2. Although the confession was not made spontaneously to a close acquaintance, the co-defendant had nothing to gain by admitting that he had been the dominant actor in the crime. In addition, because the co-defendant's statement was made on the day of the offense and resulted in the possibility of a more severe sentence, it was not likely a statement "calculated" to curry favor.

3. The court rejected the State's argument that the co-defendant's statement was not against his penal interest. "[A] declarant's statement that he committed the crime is the classic example of the statement against penal interest."

4. There was sufficient corroborating evidence to indicate that the statement was trustworthy. A finding of corroboration does not require the trial judge to be completely convinced that the exculpatory statement is true. Instead, the court must find only that there is sufficient corroboration to permit the jury to make the ultimate determination concerning the truth of the statements.

Here, the co-defendant was eventually convicted, and on appeal the State argued that any disparity between the sentences of the defendant and the co-defendant was warranted by the co-defendant's greater participation in the crime. "If evidence is sufficiently reliable for prosecutorial use, the State cannot claim it is too unreliable when offered by the defendant."

The statement was also corroborated by the first statement of a surviving victim. Although the witness changed her account at trial, the jury should have been allowed to decide which version to believe.

People v. Turner, 373 Ill.App.3d 121, 866 N.E.2d 1215 (2d Dist. 2007) The court rejected the State's argument that **Chambers** permits admission of a statement against penal interest only if the declarant admits committing the crime for which the defendant is on trial. Because the purpose for the general prohibition of statements against penal interest is to prevent false exculpatory testimony from being presented, "it makes no difference whether the declarant confesses to the crime of which the defendant is accused or some other crime, so long as the declarant's statement is probative to the defense." Under **Chambers**, the key issue is not "precisely what crime the declarant confesses to, but whether the confession is against his penal interest, and, if so, whether it is sufficiently trustworthy to be admitted."

People v. Boyd, 307 Ill.App.3d 991, 719 N.E.2d 306 (3d Dist. 1999) The trial court did not abuse its discretion by finding that affidavits were not sufficiently trustworthy to be admitted where there was no opportunity to cross-examine the declarants and three months elapsed between the events in question and the statements.

People v. Taylor, 287 Ill.App.3d 800, 679 N.E.2d 82 (5th Dist. 1997) A newly-discovered witness's testimony at the post-trial hearing in a previous trial should have been admitted as a declaration against penal interest. The Court held the statements were made under circumstances that insured their trustworthiness; the witness testified under oath that he had committed the robbery, he was subjected to unlimited cross-examination concerning the truthfulness of his claim, the statement was clearly against his penal interest, and there was corroborating evidence in the form of the earlier confession to a trusted relative. In addition, the State's initial investigation of the crime had yielded objective evidence corroborating the claim of guilt. "Taken as a whole, these circumstances provide considerable assurance of the reliability of [the] testimony."

People v. Anderson, 291 Ill.App.3d 843, 684 N.E.2d 845 (1st Dist. 1997) The trial court abused its discretion by finding that declarations against penal interest were untrustworthy. The statements were made shortly after the crimes occurred, were clearly against the declarants' penal interests, and were corroborated by other evidence. In addition, the statements were given to police and prosecutors - "a telling mark of trustworthiness" because of their obviously inculpatory nature and the fact that the declarants could expect to be prosecuted. The Court also noted that the witnesses inculpated two other members of their gang, making it less likely that defendant's name was omitted in an effort to protect gang members who had not yet been arrested, and that at the time of his statement one of the witnesses knew defendant was in custody.

The existence of minor discrepancies between the statements was insufficient to make the statements untrustworthy; each co-defendant implicated himself, named the same four perpetrators, described the same events and "detailed the crime virtually identically."

Although the State could not cross-examine the declarants at defendant's trial (because they invoked their Fifth Amendment rights), the absence of an opportunity to cross-examine does not necessarily render declarations against penal interest untrustworthy.

In addition, the trial court erred by finding the statements unreliable because there would be eyewitness testimony placing defendant at the scene and because defendant could have been guilty even if the statements in question exonerated him.

he Court also noted that it was "ironic" that the State would argue that statements taken under its exclusive control were unreliable, especially since it sought to introduce the statements at the declarants' trial.

People v. Swaggirt, 282 Ill.App.3d 692, 668 N.E.2d 634 (2d Dist. 1996) The factors specified by **Chambers** are merely indicia of trustworthiness, and need not all be present for a statement to be admissible. In addition, other indicia of trustworthiness may be considered. Admissibility is determined by whether, under the totality of the circumstances, the statement is shown to be trustworthy.

The Court considered the **Chambers** factors and concluded that the statements in this case were sufficiently trustworthy to be admitted.

a. The first factor - whether the statements were made spontaneously to a close acquaintance shortly after the crime occurred - was not satisfied in this case. Although the statements were made spontaneously and shortly after the crime, the witnesses were not "close acquaintances" of the declarant where they had known him for several years, but did not stay in close contact and were unaware of the basic facts of his life.

b. The second factor - whether the statements were corroborated by other evidence - was satisfied by testimony placing the declarant at the scene of the crime and in possession of a weapon similar to that used in the offense. In addition, one witness testified that a man who resembled the declarant hit another man with an unidentified object, and several witnesses indicated that the declarant might have struck the victim as revenge for the latter striking the declarant's daughter.

The Court rejected the State's argument that the above evidence could not be considered corroborating because "virtually all of it is from the testimony of defense witnesses" who were later found by the trial court to lack credibility. The State failed to cite any authority for "the novel proposition" that State's witnesses must be the source of corroborating evidence. In addition, the **Chambers** factors involve not credibility determinations, but objective indicia of trustworthiness.

c. The third factor - whether the statements were self-incriminating and against the declarant's penal interest - was clearly satisfied.

d. The final factor - whether the State had adequate opportunity to cross-examine the declarant - was not satisfied, because the declarant invoked his Fifth Amendment rights when called to testify. The Court rejected defendant's argument that the declarant should be considered available for cross-examination because the State could have granted him immunity.

The Court also rejected the defendant's argument the declarant was available for cross-examination because the State was able to ask to him limited questions, finding that the State did not have a fair opportunity to fully test the "trustworthiness" of the statements in question.

However, considering the circumstances as a whole, the statements were sufficiently reliable to warrant admission. "[I] light of the constitutional guarantee that criminal defendants should have a 'meaningful opportunity to present a complete defense," the trial court abused its discretion by excluding the testimony.

§19-20
Statements Concerning State of Mind

Illinois Supreme Court

People v. Cloutier, 178 Ill.2d 141, 687 N.E.2d 930 (1997) The "state of mind" exception admits out-of-court statements which tend to show the declarant's state of mind at the time of the utterance. The statements of two women could not be admitted on the theory that they disclosed the defendant's state of mind.

People v. Whiters, 146 Ill.2d 437, 588 N.E.2d 1172 (1992) At defendant's trial for voluntary manslaughter involving her stabbing of a man named "Barker," defendant should have been allowed to introduce evidence that on the day before the stabbing, Barker said he had beaten a certain women the previous night. Such testimony showed the reasonableness of defendant's belief in the need for self-defense. "Perception of danger is always material and relevant to defendant's belief that the use of deadly force is justified."

People v. Lawler, 142 Ill.2d 548, 568 N.E.2d 895 (1991) Evidence about a phone conversation the complainant had with her father was not admissible under the "state-of-mind" exception - the State used the conversation to show that defendant had a gun and that complainant could not get away, and not solely as evidence of complainant's state of mind regarding whether she consented to intercourse. In addition, no limited purpose was mentioned at trial, and the conversation was clearly used as substantive evidence in closing argument.

People v. Britz, 112 Ill.2d 314, 493 N.E.2d 575 (1986) At his trial for murder, defendant should have been allowed to introduce tape recordings of conversations he had with a Youth Service Bureau counselor who urged defendant to confess to the police. Such conversations were relevant to the truth of the defendant's confession and the weight it should be given:

> "It is clear that the defendant was attracted to [the counselor], and considering their conversations, he, in a twisted way, might have thought [she] would be impressed by the confessions. The jury should have been allowed to hear how [the counselor] appealed to a naive and distorted sense of masculinity in attempting to have the defendant implicate himself in the crime. These appeals of [the counselor] were relevant to the truth or

> falsity of the confessions, especially in light of the defendant's credulousness. Even if the jury did hear some testimony that [the counselor] had attempted to exert influence over the defendant, the testimony could not substitute for the effect of hearing the tapes."

The Court also noted that the recorded conversations were not hearsay, because "the stimulating language of [the counselor] is admissible not for its truth, but for its effect on the [defendant]."

People v. Floyd, 103 Ill.2d 541, 470 N.E.2d 293 (1984) Testimony concerning a declarant's state of mind is admissible if there is a reasonable probability that the statements are truthful and the declarant's state of mind is relevant. Here, the state of mind of the deceased was not relevant; since the deceased "voluntarily accompanied defendant on the evening of her death and that they had spent the evening drinking and dancing," and since defendant admitted that the decedent had filed for divorce and had struggled to resist his sexual advances, her statements expressing her fear that she would be harmed by the defendant served no purpose except to create the inference that defendant was guilty of her murder. See also, People v. Chevalier, 131 Ill.2d 66, 544 N.E.2d 942 (1989) ("state of mind" statements are only admissible if relevant; because deceased spouse's state of mind was not relevant at defendant's trial for murder, an attorney who had been consulted by the wife about a divorce should not have been allowed to testify to the decedent's statement that defendant had threatened her); People v. Huber, 131 Ill.App.3d 163, 475 N.E.2d 599 (1st Dist. 1985) (testimony about the deceased's statement (that defendant had threatened her with violence and was willing to go to extreme lengths to get her to return) was improper; although statements of state of mind may be admissible when "relevant to a material issue in the case," the states of mind of both the witness and the deceased were irrelevant).

People v. Bartall, 98 Ill.2d 294, 456 N.E.2d 59 (1983) The defendant was convicted, at a jury trial, of murder and armed violence. The evidence showed that defendant fired shots into a parking lot from a passing automobile, killing a person named Quinn. Over objection, the State was allowed to introduce evidence of a subsequent shooting incident in which defendant shot from an automobile into another vehicle.

Defendant contended that the trial court erred in excluding testimony by a person who was with defendant during the second shooting, and who would have testified that defendant said he was going to shoot out the tires on an automobile. Such testimony was admissible under the "statement of intent" exception to the hearsay rule (i.e., the statement was admissible to prove defendant's intent in the second shooting and to prove that he acted in accordance with that intent).

People v. Newbury, 53 Ill.2d 228, 290 N.E.2d 592 (1972) The trial court erred by excluding testimony concerning a conversation between a friend and the deceased about the planned wedding of the deceased and the defendant. Since the deceased's state of mind had been put in issue, the testimony fell within the hearsay exception governing declarations as to mental or emotional attitudes.

Illinois Appellate Court

People v. Hamilton, 2019 IL App (1st) 170019 Trial counsel was ineffective for failing to assert the proper ground for the admission of evidence. The defense theory at defendant's murder trial was that defendant saw the victim reach into his waistband before he shot him.

Both the victim's girlfriend and defendant attempted to testify that they had known the victim to carry a gun in the past. The trial court barred the testimony, finding it "conjecture" and not admissible as **Lynch** evidence because it did not go to the victim's propensity for violence.

The Appellate Court majority held that counsel was ineffective for failing to argue that the evidence goes to state of mind, for which the evidence was clearly relevant and admissible. The trial court was correct that this evidence is not covered by **Lynch**, but it was incumbent upon counsel to identify and argue the correct basis for the admission of the evidence. "The defendant had a right to expect defense counsel to understand, explain, and apply the rules of evidence to the facts of his case in support of his theory of defense, no matter how nuanced that interpretation may be." Despite the fact that no gun was actually found on the victim, there was sufficient evidence of defendant's belief in the need to act in self-defense such that exclusion of state-of-mind evidence denied defendant a fair trial.

People v. Hill, 2014 IL App (2d) 120506 Under Illinois Rule of Evidence 803(3), statements concerning the declarant's then existing state of mind, emotion, sensation, or physical condition are admissible under the "state of mind" exception to the hearsay rule. However, a hearsay statement is not admissible to prove the state of mind, emotion, sensation, or physical condition of a person other than the declarant.

By contrast, a statement is not hearsay if it is offered to show the effect of the statement on the listener's state of mind or to explain why the listener acted as he did. Thus, a statement may be admissible to show that it gave rise to a motive on the part of a person who heard the statement.

The trial court properly admitted notes which the decedent wrote before she died in a fire which defendant was charged with setting. The notes indicated that the decedent intended to end her relationship with defendant.

The evidence showed that defendant and the decedent were arguing in the apartment before the fire broke out, neighbors saw defendant's car speed away moments before the fire was first observed, and the decedent's handwritten notes were likely seen by the defendant because they were found in areas of the home where he had necessarily been during and after the argument. The court concluded that the notes were admissible on two theories - to show the decedent's state of mind, and to show the effect of the notes on defendant, including creating a motive to murder the decedent.

Defendant's convictions for first degree murder and aggravated arson were affirmed.

People v. Miller, 2013 IL App (1st) 110879 The trial court committed plain error at defendant's trial for aggravated possession of a stolen motor vehicle where it sustained a hearsay objection when the defense asked the owner of the car whether she learned, after reporting that the car was missing, that her husband had in fact sold it. The Appellate Court concluded that the question did not necessarily call for a response based on an out-of-court statement, because the record did not indicate how the witness would have come to know that her husband had sold the vehicle. Furthermore, even had the witness learned of the sale from an out-of-court statement, the question would have been proper because it was intended to show the witness's state of mind rather than to prove the truth of the matter asserted – that the car had in fact been sold. The court stressed that the evidence would have been central to the case because the owner's belief that the vehicle had been sold would have rebutted inferences that the car was stolen or that defendant had knowledge of the theft.

The court concluded that reversal was required by the cumulative effect of the exclusion of the evidence and the trial judge's reliance on an incorrect recollection of a

witness's testimony. Defendant was prejudiced by the errors because the evidence was closely balanced on whether the defendant was a *bona fide* purchaser, defendant rebutted the inference that he knew the vehicle was stolen by calling witnesses who testified that the vehicle had been purchased from the owner's husband, and defendant's explanation was reasonable and could have convinced a reasonable trier of fact.

People v. Munoz, 398 Ill.App.3d 455, 923 N.E.2d 898 (1st Dist. 2010) Under the "state of mind" exception to the hearsay rule, a hearsay statement may be admissible if it expresses the declarant's state of mind at the time of the utterance, the declarant is unavailable to testify, there is a reasonable probability that the hearsay statements are truthful, and the statements are relevant to a material issue in the case.

The trial court erred by allowing the State's key witness to testify that at various times before her death, the decedent had stated that: (1) she was tired of her relationship with the defendant, and (2) defendant was jealous and always wanted to know where she was and what she was doing. Because the "state of mind" exception authorizes the admission of hearsay only if the declarant's state of mind is relevant to a material issue, the decedent's hearsay statements would be admissible only if her state of mind was relevant, and even then only to prove that state of mind.

The court acknowledged it had previously ordered a new trial because the trial court excluded the declarant's statements indicating that she was in a suicidal state of mind. Such statements were highly relevant to a material issue in the case – whether a murder occurred. By contrast, hearsay concerning the declarant's belief that the defendant was jealous had no relevance and should not have been admitted.

The court concluded that the State attempted to use the hearsay evidence as a "back door" method of proving the truth of the hearsay – that defendant was jealous – and that he therefore had a motive to kill the decedent.

The court rejected the argument that the error was harmless, noting that the evidence was closely balanced and the hearsay went to an alleged motive.

People v. Munoz, 348 Ill.App.3d 423, 810 N.E.2d 65 (1st Dist. 2004) Under present Illinois law, "state-of-mind" declarations, including statements of intent to commit suicide, are admissible as a hearsay exception where: (1) the declarant is unavailable; (2) there is a reasonable probability that the hearsay statement is truthful; and (3) the declarant's state of mind is relevant to a material issue in the case.

Where defendant was charged with the first degree murder of his wife, and contended that she had committed suicide, testimony that she made suicidal statements one month and one week before her death should have been admitted. In the course of its holding, the court noted that most jurisdictions and legal commentators have held that a decedent's declarations or threats of suicide are generally admissible both to show the decedent's state of mind and to support a theory of suicide, at least where the circumstances of the death are equally consistent with suicide and homicide and the declarations were made within a reasonable time before death.

People v. Miller, 327 Ill.App.3d 594, 763 N.E.2d 865 (1st Dist. 2002) A criminal defendant has the right to testify concerning his intent or motive where such evidence is material to the issue of guilt. Improper exclusion of such testimony is reversible error where the testimony is essential to the defense, unless other, sufficient evidence of intent or motive is admitted.

The trial court abused its discretion and committed plain error at defendant's murder trial by excluding testimony that defendant had contemplated divorcing the decedent. Where

the State claimed that defendant killed the decedent because she was leaving him, defendant's testimony that he wanted a divorce "was clearly relevant to show the absence of the motive" argued by the State.

The trial court also erred by refusing to allow defendant to give state of mind testimony to rebut the State's theory that certain of defendant's actions showed consciousness of guilt. Although the admission of evidence is left to the trial court's discretion, the judge twice "precluded defendant from testifying regarding a material issue in the case and then allowed the State to exploit the lack of defendant's testimony in closing arguments."

People v. Booker, 274 Ill.App.3d 168, 653 N.E.2d 952 (1st Dist. 1995) Where defendant was tried for first degree murder and claimed that he acted in self-defense, the trial court erred by refusing to allow the defense to present evidence that defendant feared the deceased. Among the excluded evidence was defendant's testimony that a friend had overheard the decedent say that defendant would be "dealt with" if he testified in an upcoming court case and that at the time of the offense, defendant knew that the decedent had previously been charged with murder.

People v. Upton, 230 Ill.App.3d 365, 595 N.E.2d 56 (1st Dist. 1992) Where defendant was charged with attempt murder and aggravated battery based on shooting a tow truck operator who was repossessing defendant's vehicle, and contended that he fired his weapon only to stop what he believed to be a theft of his vehicle, he should have been allowed to testify whether he intended to kill or cause great bodily harm. A defendant who is charged with specific intent offenses is permitted to testify directly to his state of mind.

People v. Keefe, 209 Ill.App.3d 744, 567 N.E.2d 1052 (1st Dist. 1991) When a defendant raises self-defense, he is permitted to testify directly about his state of mind and whether he subjectively believed that it was necessary to use force. Where defendant testified that he took out his knife because he was being strangled by the complainant, he should have been allowed to also testify whether he was afraid and what he was feeling. See also, **People v. Suerth**, 97 Ill.App.3d 1005, 423 N.E.2d 1185 (1st Dist. 1981) (at trial for involuntary manslaughter involving the shooting of a person in the vestibule of an apartment building at 5:00 a.m., defendant should have been allowed to testify about a two-year-pattern of break-ins, burglaries and arsons in the building; evidence was relevant to defendant's state of mind in arming himself when he heard noises).

People v. Eshaya, 144 Ill.App.3d 757, 494 N.E.2d 772 (1st Dist. 1986) The trial judge properly prohibited a defense witness, an occurrence witness, from testifying about his own state of mind at the time of a shooting. Although a defendant's state of mind immediately before a killing is relevant when self-defense is raised, an occurrence witness's state of mind is not in question.

People v. McMullen, 138 Ill.App.3d 872, 486 N.E.2d 412 (2d Dist. 1985) Where a police officer testified that when he served the burglary complaint, defendant said he "should be getting a complaint for possession of stolen property instead of burglary," defendant should have been allowed to answer the question, "[W]hat were you thinking" when making the statement. Defendant's state of mind when he made the statement was relevant because his explanation could have affected the weight which the jury gave to the statement.

People v. Evans, 104 Ill.App.3d 598, 432 N.E.2d 1285 (1st Dist. 1982) At his trial for aggravated battery, the defendant raised self-defense and sought to testify about his knowledge of the complainant's prior conviction for murder. The State objected on the ground that the conviction was more than 10 years old and was therefore inadmissible under **People v. Montgomery**, 47 Ill.2d 510, 268 N.E.2d 695 (1971). The Appellate Court held that the 10-year rule of Montgomery was inapplicable because the prior conviction was offered to show defendant's state of mind, not to impeach the complainant's credibility. The defendant's knowledge of the complainant's prior murder conviction was admissible to show the reasonableness of defendant's apprehension of imminent harm.

People v. Adams, 102 Ill.App.3d 1129, 430 N.E.2d 267 (2d Dist. 1981) Witness's testimony about a telephone conversation with the deceased shortly before his death was properly admitted. Because the deceased stated he was leaving defendant, with whom he was living, the conversation was used to show the intent or state of mind of the deceased.

People v. Christen, 82 Ill.App.3d 192, 402 N.E.2d 373 (2d Dist. 1980) The trial judge committed reversible error by sustaining the State's objections to defense counsel's questions, on direct examination of the defendant, concerning defendant's state of mind before the shooting. Because defendant was charged with murder and raised self-defense, he was entitled to testify directly about his state of mind at the time of the incident.

Defendant did not waive the issue by failing to make an offer of proof when the objection was sustained; under the circumstances, the relevance and content of the testimony were adequately demonstrated.

People v. Goodman, 77 Ill.App.3d 569, 396 N.E.2d 274 (4th Dist. 1979) Testimony concerning statements of the deceased (that because he was afraid for his life he hid his ammunition when he returned home from work) was admissible under the state of mind exception to the hearsay rule. The state of mind exception is limited to instances where: (1) the declarant is unavailable, and (2) there is a reasonable probability that the proffered hearsay statements are truthful. Both requirements were satisfied in this case.

People v. Ortiz, 65 Ill.App.3d 525, 382 N.E.2d 303 (1st Dist. 1978) At his murder trial, defendant attempted to establish that he reasonably believed the use of force to be necessary to prevent death or great bodily harm to himself. The trial court erred by not allowing the defendant to testify that immediately before the incident, a certain person warned him that the alleged victim was a "killer." This testimony was not offered for the truth of the matter asserted, but was evidence of a material issue - the defendant's state of mind at the time of the occurrence.

People v. Fletcher, 59 Ill.App.3d 310, 375 N.E.2d 1333 (1st Dist. 1978) Evidence of deceased police officer's final radio transmission ("406 Hillside, traffic stop, Mannheim and I-90, double 'L' Lincoln") was admissible to show the intent or state of mind of the officer. The transmission demonstrated the officer's intent to stop the vehicle.

People v. Garlick, 46 Ill.App.3d 216, 360 N.E.2d 1121 (5th Dist. 1977) Trial court erred by prohibiting defendant's mother and sister from testifying about various statements made by defendant during the month prior to an alleged murder. Such testimony was not hearsay - it

was not offered to show the truth of the matter asserted therein, but concerning defendant's mental state and an insanity defense.

People v. Reddock, 13 Ill.App.3d 296, 300 N.E.2d 31 (2d Dist. 1973) The deceased's sister was properly allowed to testify about deceased's statement that he was meeting defendant. A statement of intent that refers to a destination and is made at the time of departure on a journey is admissible as an exception to the hearsay rule.

§19-21
Statements to Treating Physicians

United States Supreme Court
Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) Most traditional hearsay exceptions involve "non-testimonial" hearsay, for which the Sixth Amendment permits States to exercise flexibility in developing the law of hearsay. A showing of unavailability and a prior opportunity for cross-examination are not required for admission of "non-testimonial" hearsay. See also, **People v. Purcell**, 364 Ill.App.3d 283, 846 N.E.2d 203 (2d Dist. 2006) (decedent's statements to treating physician concerning the cause of her injuries were "non-testimonial" to the extent that they described the nature of the alleged attack and her injuries, but were "testimonial" when she identified the defendant as the person who caused the injuries); **People v. Spicer**, 379 Ill.App.3d 441, 884 N.E.2d 675 (1st Dist. 2007) (725 ILCS 5/115-13 provides that in prosecutions for specified sex offenses, statements made by the victim to medical personal for purposes of medical diagnosis or treatment shall be admitted as an exception to the hearsay rule; however, admission of "testimonial" hearsay violates **Crawford**; hearsay was "testimonial" because objective circumstances showed no ongoing emergency and that the primary purpose of the statement was to establish or prove past events which would be potentially relevant to a later prosecution; physician was an "agent" of the police who "interrogated" the complainant).

Illinois Supreme Court
People v. Torres, 2024 IL 129289 Counsel was not ineffective for failing to invoke the patient-physician privilege to exclude inculpatory evidence. Defendant was accused of sexually assaulting his young daughter. After her initial outcry in 2013, the complainant was taken to the hospital where she tested positive for chlamydia. DCFS asked defendant and the complainant's mother to submit to testing for chlamydia. A few days later, defendant went to the ER complaining of symptoms of chlamydia, and he tested positive. Defendant did not reveal the results of the test, and DCFS did not follow up because the complainant named only her six-year-old cousin as a possible offender.

In 2016, the complainant tested positive again for chlamydia, and DCFS again ordered testing for her parents. Both tested positive. The complainant's treating nurse looked into defendant's medical history and discovered the earlier positive result. The complainant eventually accused defendant of assault, first to her mother then to the authorities. The nurse informed investigators about defendant's medical records, which the police then obtained via subpoena. Defendant eventually made inculpatory statements during an interview with police, during which he disclosed the positive test results. At trial, the State introduced evidence of these results. The defense did not object.

On appeal, defendant argued ineffective assistance for failure to challenge the admission of defendant's 2013 and 2016 positive test results under the physician-patient privilege statute. This statute provides, subject to several exceptions, that "[n]o physician or

surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient." The appellate court affirmed, finding the 2016 test was not conducted for treatment purposes and therefore not subject to the privilege. As for the 2013 test results, the appellate court held these were subject to the physician-patient privilege but that the exception to the privilege set out in subsection (7) applied. This exception allows a physician to share privileged medical information "in actions, civil or criminal, arising from the filing of a report in compliance with the Abused and Neglected Child Reporting Act."

The supreme court agreed with the appellate court. The 2016 test results were discovered when DCFS asked defendant to submit to testing. Thus, the medical professional who conducted the test did not do so for purposes of treatment, but rather for purposes of an investigation. Even though the test led to treatment, the results were obtained prior to the treatment. The patient-physician exception does not apply in this situation.

The supreme court also agreed that, while the privilege applied to the 2013 test, the subsection (7) exception applied. Although defendant, citing **People v. Bons**, 2021 IL App (3d) 180464, argued that the information must be included in a report filed under the Abused and Neglected Child Reporting Act in order to fall under the exception, the supreme court disagreed, finding the plain language "clearly provides that the exception under subsection (7) is not based on the origin of the medical information, but rather, is based on where or in what type of proceedings the information is being disclosed." Because this was a criminal action, the physician or nurse could share the information under subsection (7). An objection by defense counsel would have been futile, and therefore defendant could not show ineffective assistance of counsel.

People v. Falaster, 173 Ill.2d 220, 670 N.E.2d 624 (1996) Defendant argued that the trial court erred by allowing a registered nurse who had taken a medical history from the complainant to testify that the latter identified defendant as the perpetrator of the offenses. The nurse took the medical history as part of an examination by a doctor who saw the complainant after she claimed to have been sexually abused. The testimony was admitted under 725 ILCS 5/115-13, which provides that in prosecutions for certain sex offenses, "statements made by the victim to medical personnel for purposes of medical diagnosis or treatment . . . insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule."

An examination conducted to investigate a claim of sexual abuse may qualify for admission under §115-13. The statute does not distinguish between examining and treating physicians; in addition, "we do not agree with defendant that the diagnostic purpose of the examination would be incompatible with its investigatory function."

The Court rejected the argument that the complainant's identification of the offender was inadmissible because it was irrelevant to her "diagnosis and treatment." In cases involving allegations of sexual abuse, "a victim's identification of a family member as the offender is closely related to the victim's diagnosis and treatment." Thus, the identification of the perpetrator is made for purposes of medical "diagnosis or treatment," and §115-13 applies. Compare, **People v. Sexton**, 162 Ill.App.3d 607, 515 N.E.2d 1359 (4th Dist. 1987) (physician's testimony as to statements by the patient may not include name or description of the assailant).

People v. Britz, 123 Ill.2d 446, 528 N.E.2d 703 (1988) The trial court properly prohibited defense psychiatrists from testifying about statements made to them by the defendant during

their examinations. The Court distinguished this case from Anderson, in which the expert relied on reports by other psychiatrists, information relating to the defendant's prior offense, and statements made to the expert by the defendant. Here, the experts did not rely on any other reports, did not refer to any statements of witnesses or police officers, and did not talk to friends or members of defendant's family. Thus, their opinions relied substantially on defendant's statements.

The Court concluded:

> "To allow an expert to rely solely on self-serving statements made by the defendant to determine his sanity defense . . . [would] circumvent and abrogate the intent and meaning of the Federal Rules of Evidence [Rules 703 and 705] and the rules announced in **Wilson [v. Clark**, 84 Ill.2d 186, 417 N.E.2d 1322 (1981)] and Anderson. If this court were to allow such testimony, it would open the door for a defendant to tell his side of the story without the possibility of being cross-examined."

People v. Anderson, 113 Ill.2d 1, 495 N.E.2d 485 (1986) An examining psychiatrist may testify about the statements made to him by the defendant when such statements were relied upon in forming his diagnosis. Such statements are not offered for their truth, but merely to explain the basis of the witness's opinion. The holding in **People v. Hester**, 39 Ill.2d 489, 237 N.E.2d 466 (1968) (that a nontreating expert may not testify about the statements of a defendant) was rejected. See also, **Melecosky v. McCarthy**, 115 Ill.2d 209, 503 N.E.2d 355 (1986) (examining physician).

People v. Gant, 58 Ill.2d 178, 317 N.E.2d 564 (1974) A treating doctor may testify about the statements of a patient to the extent that such statements concern "presently existing bodily condition" and the "cause or the external source of the condition to be treated." The doctor's testimony may include some details of the incident.

Illinois Appellate Court

People v. Boling, 2014 IL App (4th) 120634 725 ILCS 5/115-13 authorizes the admission of statements of the complainant in a sex offense prosecution when such statements are made to medical personnel for purposes of medical diagnosis or treatment, insofar as those statements are reasonably pertinent to diagnosis or treatment. Section 115-13 permits details of sex acts to be admitted, including how, when, and where the act occurred and the identity of the perpetrator.

Thus, statements which the complainant made to a nurse/sexual assault examiner and which identified defendant as the attacker were admissible under §115-13. Furthermore, §115-13 authorized admission of statements concerning the defendant's threats to harm the complainant's pets if she told anyone about the abuse, because those statements were relevant to the declarant's state of mind and emotional condition.

However, §115-13 did not authorize admission of the declarant's statements that: (1) defendant apparently abused another person, and (2) the declarant told her mother about the abuse because she "heard that maybe it had happened to some other kids." These statements were not reasonably pertinent to the declarant's diagnosis or treatment.

Because the State's case in a prosecution for sex offenses against a child was based on the credibility of minor witnesses, the court found that the evidence was closely balanced. Thus, the plain error rule applied. Because defendant was denied a fair trial by the cumulative effect of several errors including the erroneous admission of hearsay evidence,

allowing a prosecution witness to testify concerning the credibility of the complainant, and commenting in closing argument on the credibility of witnesses, the convictions were reversed and the cause remanded for a new trial.

People v. Taylor, 409 Ill.App.3d 881, 949 N.E.2d 124 (1st Dist. 2011) Defense counsel waived claims that a doctor was erroneously allowed to give hearsay testimony concerning medications prescribed by other doctors. On the merits, the court held that under exceptions to the hearsay rule, a treating physician may testify to the contents of a patient's medical records and to medications the patient is taking.

People v. Freeman, 404 Ill.App.3d 978, 936 N.E.2d 1110 (1st Dist. 2010) A common law exception to the rule against hearsay exists with respect to statements made to medical personnel for purposes of diagnosis and treatment. That exception is codified with respect to statements of sexual assault victims by 725 ILCS 5/115-13. Such statements are considered relevant and reliable.

No error occurred in the admission pursuant to this statute of the statement of an alleged victim of a sexual assault to an ER physician that she had not had sex before, where the physician testified that statement informed his treatment and diagnosis of sexual assault.

People v. McNeal, 405 Ill.App.3d 647 955 N.E.2d 32 (1st Dist. 2010) Even if the testimony of the nurse regarding the triage notes was hearsay, it was properly admitted as an exception to the hearsay rule pursuant to 725 ILCS 5/115-13, which authorizes admission of statements of sexual assault victims made to medical personnel for purposes of medical diagnosis and treatment.

Admission of the testimony of the nurse regarding the triage notes did not violate the Sixth Amendment Confrontation Clause because the notes were not testimonial hearsay. To determine whether hearsay is testimonial, the focus is on whether, at the time the statement was made, the declarant was acting in a manner analogous to a witness at trial, describing or giving information regarding events that had previously occurred. When the statement is the product of questioning by persons other than law enforcement personnel, the proper focus is the intent of the declarant. The inquiry is whether the objective circumstances would lead a reasonable person to conclude that the statement would be used against the defendant.

The court considered the declarant to be the nurse who prepared the triage notes and concluded that because her intent was to gather information for treatment and not prosecution, the notes were not testimonial.

People v. Spicer, 379 Ill.App.3d 441, 884 N.E.2d 675 (1st Dist. 2007) Admission of "testimonial" hearsay to physician violated **Crawford**; hearsay was "testimonial" because the objective circumstances showed that there was no ongoing emergency and that the primary purpose of the statement was to establish or prove past events which would be potentially relevant to a later prosecution.

The doctor was an "agent" of the police, so that his questioning of the complainant constituted "interrogation." A physician has a dual function in a rape case - both to investigate the crime and to provide medical treatment. The statement in question would clearly have been "testimonial" had it been made to a police officer - the holding should not be different merely because the officer took the victim to a doctor who then took a statement. The Confrontation Clause cannot be "evaded by having the note-taking policeman simply bring the victim to a note-taking doctor."

People v. Oehrke, 369 Ill.App.3d 63, 860 N.E.2d 416 (1st Dist. 2007) The 91-year-old complainant's statements - that her son had abused her - were made for medical diagnosis or treatment. In cases involving sex offenses against minors, the identity of the offender has sometimes been held to be relevant to diagnosis and treatment because the physician needs to ensure that the complainant is not released to a dangerous situation. However, no Illinois court "has extended the medical diagnosis and treatment hearsay exception to include an adult physical abuse victim's statements identifying an attacker." To do so, "we would have to shift the rationale behind the hearsay exception from medical treatment and diagnosis to prevention of future physical harm. We decline to broaden the terms of the . . . exception by judicial fiat."

People v. Purcell, 364 Ill.App.3d 283, 846 N.E.2d 203 (2d Dist. 2006) The complainant's statements to a treating physician concerning the cause of her injuries were "non-testimonial" to the extent that they described the nature of the alleged attack and her injuries, but were "testimonial" when she identified the defendant as the person who caused the injuries. Under **Crawford v. Washington**, the "testimonial" statements could not be admitted.

People v. Mitchell, 200 Ill.App.3d 969, 558 N.E.2d 559 (5th Dist. 1990) Statements that are not reasonably pertinent to diagnosis or treatment are not admissible under 725 ILCS 5/115-13 (authorizing the admission of statements relevant to medical diagnosis or treatment in prosecutions for certain sex offenses). Statement that assailant said he would take what he wanted if the complainant would not go out with him, and claim that the assailant demanded money after the sexual attack, were inadmissible.

People v. Winfield, 160 Ill.App.3d 983, 513 N.E.2d 1032 (1st Dist. 1987) The "statements to a treating physician" exception applies to statements made to a nurse.

People v. Falkner, 131 Ill.App.3d 706, 475 N.E.2d 964 (2d Dist. 1985) Evidence obtained through an autopsy does not qualify for the "treating physician" exception to the hearsay rule.

People v. Fuelner, 104 Ill.App.3d 340, 432 N.E.2d 986 (1st Dist. 1982) A statement by the complainant's mother (that complainant was raped), made to the physician treating the complainant, was not admissible under the "statement to a treating physician" exception. This exception permits testimony about statements made by the patient to the physician concerning the cause of the condition to be treated, but does not allow testimony about statements made to the physician by a third party.

§19-22
Judicial Notice

§19-22(a)
Generally

United States Supreme Court

Garner v. Louisiana, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961) Due process requires that a defendant be informed of the facts of which the court is taking judicial notice, and that such facts be put in the record for appellate review.

Judicial notice is the recognition by a judge or jury that a certain fact is true, without the need for any formal proof. Judicial notice may be taken of matters which come within either of the following two categories:

1. Matters of common knowledge or which everyone knows to be true. (**Owens v. Green**, 400 Ill. 380, 81 N.E.2d 149 (1948); **People v. Jones**, 31 Ill.2d 42, 198 N.E.2d 821 (1964); **People v. Tassone**, 41 Ill.2d 7, 241 N.E.2d 419 (1968).

2. Matters that are readily verifiable from sources of indisputable accuracy. **People v. Davis**, 65 Ill.2d 157, 357 N.E.2d 792 (1976); **In Re Abdullah**, 85 Ill.2d 300, 423 N.E.2d 915 (1981).

Illinois Supreme Court

People v. Fisher et al., 184 Ill.2d 441, 705 N.E.2d 67 (1998) The court refused to take judicial notice of the assertion that non-first-time DUI offenders under the age of 21 present a greater risk to highway safety than non-first-time DUI offenders over that age:

> "Courts may take judicial notice of matters which are commonly known, or, if not commonly known, are readily verifiable from sources of indisputable accuracy. . . . A cursory examination of relevant, if not indisputable, authority reveals that it is impossible to readily confirm that non-first offenders under the age of 21 pose the greater risk to highway safety."

Illinois Appellate Court

People v. Messenger, 2015 IL App (3d) 130581 The trial court must take judicial notice of an "adjudicative" fact when requested to do so by a party who supplies the court with any necessary supporting information. Illinois Rule of Evidence 201(d). The judicial notice doctrine extends to facts which, while not generally known, are readily verifiable from sources of indisputable accuracy. A court may take judicial notice of a fact which constitutes an element of the offense. Judicial notice is reviewed for abuse of discretion.

Here, the trial court properly took judicial notice of the fact that the jail complex where a battery occurred was "public property." Outside the jury's presence, a witness testified that Whiteside County owned the complex and that the area where the battery occurred was not open to the public.

Under **Apprendi**, any fact other than a prior conviction which increases the maximum penalty for a crime must be charged, submitted to a jury, and proven beyond a reasonable doubt. The court found that taking judicial notice of an element of a crime does not violate **Apprendi** so long as the jury has the option to accept or reject the fact concerning which judicial notice was taken. In addition, an IPI instruction (Criminal 4th No. 1.01) informs the jury that it need not accept as conclusive any fact that has been judicially noticed.

The trial court failed to give IPI Criminal 4th No. 1.01, and instead gave a non-IPI instruction stating that the "entire county jail is public property." The court found that the failure to give the IPI instruction constituted error, but that error was harmless in light of the overwhelming evidence of guilt, the trial court's oral admonishment to the jury during trial that the court had taken judicial notice that the jail was public property but that judicially noticed facts are not conclusive, and the inability of the defense to produce any evidence to rebut the fact that the jail was public property.

People v. Rubalcava, 2013 IL App (2d) 120396 Defendant was charged with having unlawful contact with a street gang member for having direct contact with Antonio Delgadillo. (725 ILCS 5/25-5(a)(3)). To establish guilt, the State was required to prove beyond a reasonable doubt that defendant had contact with a street gang member after being ordered in a non-criminal proceeding to refrain from such contact. A "streetgang member" is defined as a person who "actually and in fact belongs to a gang." (740 ILCS 147/10).

The Appellate Court reversed the conviction on reasonable doubt grounds. In the course of its holding, the court held that it would have been improper for the trial judge to take judicial notice of the evidence presented in a civil case in which a different trial judge found that Delgadillo was "more likely than not" a gang member. The parties did not dispute that the trial court properly took judicial notice of the finding that Delgadillo was "more likely than not" a gang member.

Under Illinois Rule of Evidence 201(b), a judicially noticed fact must not be subject to reasonable dispute in that it is either: (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. The court concluded that the evidence in the civil case - police testimony and descriptions of photographs of purported gang members - did not satisfy this standard, particularly since Delgadillo disputed it in both the civil and civil trials.

In addition, although a court may take judicial notice of matters of record, taking judicial notice does not permit the admission of hearsay evidence which would otherwise be prohibited. Testimony in a previous action is admissible in a subsequent proceeding if the witness is dead, insane, or so ill that he cannot travel, or if he is "kept out of the way by the adverse party." Testimony from a prior proceeding is not admissible through judicial notice.

The court rejected the argument that defendant waived the issue and in effect stipulated to use of the evidence in the civil case where he agreed that the trial court could take judicial notice of matters of record. In the absence of a stipulation or a clear forfeiture, the trial court could take notice only of matters that were properly subject to judicial notice. Defendant's recognition of the fact that the trial court could take judicial notice of its own records did not constitute an agreement that all of the evidence presented in the civil case could be considered against him substantively in the criminal case.

People v. Boykin, 2013 IL App (1st) 112696 A reviewing court may take judicial notice of matters not previously presented to the trial court when the matters are capable of instant and unquestionable demonstration. A reviewing court will not take judicial notice of critical evidentiary material not presented to and not considered by the fact finder during its deliberations.

In a prosecution for delivery of a controlled substance within 1,000 feet of a school, evidence of the school's closure is critical material that was not presented to the trier of fact. Therefore the Appellate Court declined to take judicial notice of the school's closure based on newspaper articles and a news release.

People v. Love, 2013 IL App (3d) 120113 Illinois Rule of Evidence 201 governs judicial notice of adjudicative facts and provides that judicial notice may be taken at any stage of a proceeding. When a court allows a party's request to prove an adjudicative fact by judicial notice in a criminal proceeding, "the court shall inform the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." Ill. R. Evid. 201(g). This directive is rooted in the criminal defendant's constitutional right to a jury trial.

Outside the presence of the jury in a DUI prosecution, the court took judicial notice that the applicable conversion factor for blood serum alcohol content to whole blood alcohol content is 1.18, as provided by the Illinois Administrative Code. Over objection, the court gave the jury this non-IPI instruction regarding the conversion factor:

> In the course of this case, you have heard testimony about the results of a blood draw. There are two ways to measure blood alcohol concentration: by serum levels or by what is called whole blood. Whole blood is [the] standard used by law enforcement and legal proceedings, and it can be calculated by converting the serum level to the whole blood equivalent. In this case, the testimony was that the serum level was .190. The blood serum or blood plasma alcohol concentration results will be divided by 1.18 to obtain a whole blood equivalent. After conversion, the whole blood equivalent is .161.

This instruction violates Ill. R. Evid. 201. It contains no cautionary language advising the jury that it was not mandated to accept the identified conversion factor or adopt the calculations based on a formula using this factor. It also referenced a contested fact, defendant's purported blood serum level, that was not subject to judicial notice, and in this respect became testimonial.

The error was not harmless. A separate instruction informed the jury that *if* it found defendant's alcohol level was greater than 0.08, it *may* presume that defendant was under the influence of alcohol. The judicial notice instruction did not contain similar limiting language that the jury was not required to conclude that defendant's blood alcohol level was .161. The jury could have easily viewed the defective instruction to require it to find that defendant's blood alcohol level was twice the level that supported a strong but permissive presumption of intoxication.

People v. Spencer, 408 Ill.App.3d 1, 948 N.E.2d 196 (1st Dist. 2011) The Appellate Court refused to take judicial notice that a high school parking lot was not open to the public and was reserved for registered parking by students and faculty. The website that the State referenced for this information contained forms for the 2010-11 school year and did not show that the parking policies were in effect in 2006 when defendant was arrested.

People v. Armstrong, 395 Ill.App.3d 606, 919 N.E.2d 57 (1st Dist. 2009) The court declined to consider whether it was error to take judicial notice of a diagnosis of Shaken Baby Syndrome without first holding a **Frye** hearing. The court noted that even if a **Frye** hearing should have been held, the error was harmless because there was ample evidence that blunt force trauma caused the child's death. "To the extent question remains as to acceptance . . . of the scientific validity of Shaken Baby Syndrome as a diagnosis, we conclude this is not the case to provide an answer. . . . [T]he guilty verdict did not turn on the admission of evidence relating to the syndrome."

People v. Jakupcak, 275 Ill.App.3d 830, 656 N.E.2d 442 (3d Dist. 1995) The Northwestern University traffic accident reconstruction manual could be considered on appeal though it had not been introduced at trial. Scholarly works to which the parties and witnesses referred at trial are properly considered on appeal, even if they were not actually introduced. Here, a defense expert testified that he had written one of the chapters in the manual, and the State's expert conceded that the manual was an authoritative treatise.

In re McDonald, 144 Ill.App.3d 1082, 495 N.E.2d 78 (4th Dist. 1986) Trial judge should advise the parties that judicial notice is being taken so they may be heard on the question.

People v. Varnado, 66 Ill.App.3d 413, 384 N.E.2d 37 (1st Dist. 1978) A court is not required to take judicial notice of any matter unless requested to do so. A party which wants a matter to be judicially noticed must usually bring the matter to the attention of the court on the record.

§19-22(b)
Proper Judicial Notice

Judicial notice may be taken of the following:

1. **Geographical Facts**

Geographical facts that are well known. **People v. Greene**, 27 Ill.App.3d 1080, 328 N.E.2d 176 (1st Dist. 1975).

The distance between certain cities. **People ex rel. Lejcar v. Meyering**, 345 Ill. 449, 178 N.E. 80 (1931).

That Cicero is in Cook County. **People v. Bucciferro**, 37 Ill.App.3d 211, 345 N.E.2d 738 (1st Dist. 1976).

That a certain city is within a certain county. **People v. Meid**, 130 Ill.App.2d 482, 264 N.E.2d 209 (2d Dist. 1970).

That two named cities are within the same county. **People v. Harvey**, 48 Ill.App.2d 261, 199 N.E.2d 236 (1st Dist. 1964).

That a certain highway junction is in a particular county. **People v. Stoafer**, 112 Ill.App.2d 198, 251 N.E.2d 108 (5th Dist. 1969).

2. **Dates and Weather Conditions**

The days and dates shown on a calendar. **People v. Duyuejonck**, 337 Ill. 636, 169 N.E. 737 (1930).

That daylight savings time was in effect on July 30 and that it was light at 4:30 p.m. **People v. Cain**, 14 Ill.App.3d 1003, 303 N.E.2d 756 (1st Dist. 1973).

That it is dark at 7:00 p.m. in October. **People v. Schwabauer**, 369 Ill. 261, 16 N.E.2d 723 (1938).

3. **Court Records**

Prior conviction of the defendant in the same court. **People v. Davis, supra; People v. Tucker**, 44 Ill.App.3d 583, 358 N.E.2d 729 (3d Dist. 1976).

Other proceedings in the same case before the court; a judge at a delinquency proceeding may take judicial notice that at a suppression hearing in the same case, the respondent testified that he was 15 years old. **In re Brown**, 71 Ill.2d 151, 374 N.E.2d 209 (1978); **People v. Rupert**, 148 Ill.App.3d 27, 499 N.E.2d 93 (3d Dist. 1986).

Court may take judicial notice of its own records. **People v. Hoffman**, 25 Ill.App.3d 261, 322 N.E.2d 865 (1st Dist. 1974); People v. Chisum, 30 Ill.App.3d 546, 333 N.E.2d 546 (2d Dist. 1975).

Appellate court may take judicial notice of its own records. **People v. Alexander**, 40 Ill.App.3d 457, 352 N.E.2d 245 (1st Dist. 1976).

Testimony in another proceeding based on a transcript of such testimony. **In Re McDonald**, 144 Ill.App.3d 1082, 495 N.E.2d 78 (4th Dist. 1986).

4. **Laws and Public Records**

The common law. **People v. Horwitz**, 362 Ill. 289, 199 N.E. 788 (1936).

The laws of other states and the U.S. **People v. Behnke**, 41 Ill.App.3d 276, 353 N.E.2d 684 (5th Dist. 1976).

City ordinances. **City of Palos Heights v. Pakel**, 121 Ill.App.2d 63, 258 N.E.2d 121 (1st Dist. 1970).

Regulations of the Illinois Department of Corrections. **Baker v. Department of Law Enforcement**, 124 Ill.App.3d 964, 464 N.E.2d 1260 (2d Dist. 1984).

Records of the Illinois Department of Corrections and Parole and Pardon Board. **People v. Dupree**, 16 Ill.App.3d 769, 306 N.E.2d 693 (1st Dist. 1974); **People v. Sykes**, 45 Ill.App.3d 674, 359 N.E.2d 897 (5th Dist. 1977).

That the defendant has been paroled. **People v. Bryan**, 5 Ill.App.3d 1006, 284 N.E.2d 706 (4th Dist. 1972) **People v. Gossage**, 80 Ill.App.3d 36, 399 N.E.2d 334 (3d Dist. 1980).

Rules and regulations of a fire protection district. **Sye v. Wood Dale Fire Prot. Dist. No. 1**, 43 Ill.App.3d 48, 356 N.E.2d 938 (2d Dist. 1976).

A directive of the Illinois Department of Public Aid. **People ex rel. Newdelman v. Weaver**, 50 Ill.2d 237, 278 N.E.2d 81 (1972).

The contents of the pathological report and protocol of the coroner's office. **People v. Garrett**, 62 Ill.2d 151, 339 N.E.2d 753 (1975).

5. **Scientific Principles and Drug Use**

The reliability of learned treatises, periodicals and other scientific works by recognized authorities. **Darling v. Charleston Community Memorial Hospital**, 33 Ill.2d 326, 211 N.E.2d 253 (1965).

The accuracy of radar as a means of determining speed. **People v. Beil**, 76 Ill.App.3d 924, 395 N.E.2d 400 (4th Dist. 1979); **People v. Abdallah**, 82 Ill.App.2d 312, 226 N.E.2d 408 (1st Dist. 1967).

Scientific reliability of the ABO system of blood grouping. **People v. Gillespie**, 24 Ill.App.3d 567, 321 N.E.2d 398 (2d Dist. 1974).

The scientific dispute on the harmfulness of cannabis. **Illinois NORML, Inc. v. Scott**, 66 Ill.App.3d 633, 383 N.E.2d 1330 (1st Dist. 1978).

That heroin is a derivative of opium. **People v. Robinson**, 14 Ill.2d 325, 153 N.E.2d 65 (1958).

That heroin is a narcotic. **People v. Adams**, 46 Ill.App.3d 735, 361 N.E.2d 827 (5th Dist. 1977).

That narcotic addicts turn to theft as a way of paying for their habit. **People v. Jones**, 31 Ill.2d 42, 198 N.E.2d 821 (1964).

That the terms "reds," "red devils," and "Christmas trees" refer to the drug secobarbital. **People v. Davis**, 6 Ill.App.3d 622, 286 N.E.2d 8 (4th Dist. 1972).

That cannabis is called marijuana, but not heroin. **People v. Washington**, 81 Ill.App.2d 90, 225 N.E.2d 472 (1st Dist. 1966).

That there are varied effects from the use of alcoholic liquors. **Grant v. Paluch**, 61 Ill.App.2d 247, 210 N.E.2d 35 (1st Dist. 1965).

6. **Miscellaneous Matters**

That property has some value; in this case, that a tractor and trailer were worth more than $150. **People v. Tassone**, 41 Ill.2d 7, 241 N.E.2d 419 (1968).

That an 11-year-old automobile has some value, less than $150. **People v. Sparks**, 9 Ill.App.3d 470, 292 N.E.2d 447 (1st Dist. 1972).

That a supermarket chain was a corporation capable of owning property. **People v. Sims**, 29 Ill.App.3d 815, 331 N.E.2d 178 (1st Dist. 1975).

The corporate status of the Checker Cab Company. **People v. Middleton**, 43 Ill.App.3d 1030, 357 N.E.2d 1238 (1st Dist. 1976).

That in many cases an informer might be in danger if he testifies. **People v. Hall**, 117 Ill.App.2d 116, 253 N.E.2d 890 (1st Dist. 1969).

That plastic bags make rustling noises. **People v. Bolender**, 24 Ill.App.3d 804, 322 N.E.2d 624 (2d Dist. 1974).

Frequently used, variety, conventionality and utility in mode of dress. **People v. Moore**, 6 Ill.App.3d 932, 287 N.E.2d 130 (1st Dist. 1972).

Illinois Supreme Court

People v. Castillo, 2022 IL 127894 Defendant was convicted of two counts of aggravated battery arising out of an incident which occurred while he was an inmate at Pontiac Correctional Center. Specifically, it was alleged that defendant knowingly made physical contact of an insulting or provoking nature with a guard and a fellow inmate when he struck each with an unknown liquid substance. The count against the guard was aggravated by virtue of the guard's status as a correctional institution employee, and the count against the inmate was aggravated because it was committed on "public property."

Defendant challenged whether the cell block where the incident occurred was "public property" within the meaning of the aggravated battery statute. Alternatively, defendant argued that the State failed to prove ownership of Pontiac Correctional Center sufficient to satisfy the "public property" element.

While defendant framed the issue as whether the specific cellblock where the battery occurred was public property, the Court found that the actual question was whether Pontiac Correctional Center was public property. The Court concluded that the plain and ordinary meaning of "public property" is property owned by the government, with no additional requirements. In reaching this decision, the Court overruled **People v. Ojeda**, 397 Ill. App. 3d 285 (2d Dist. 2009), which had defined public property as that which is owned by the government *and* accessible to the public.

As to the ownership question, the Court agreed that the State had presented no evidence on the issue, which is an essential element of aggravated battery as charged here. But, Illinois Rule of Evidence 201 allows a court to take judicial notice at any stage of the proceedings, which includes for the first time on appeal. Even where a fact is an element of an offense, a court may take judicial notice where it is not subject to reasonable dispute. The ownership of Pontiac was capable of easy verification, and thus judicial notice was proper. Defendant's convictions were affirmed.

Illinois Appellate Court

People v. Cruz, 2019 IL App (1st) 170886 In a DUI case, the trial court agreed to the State's request to take judicial notice of and instruct the jury pursuant to section 1286.40 of Title 20 of the Administrative Code, which states that the concentration of alcohol in a person's blood serum should be divided by 1.18 to calculate BAC. A doctor testified that defendant's blood test revealed a blood serum alcohol concentration of 190 milligrams per deciliter. In closing, the State completed the calculation and informed the jury that defendant's BAC was 0.16, twice the legal limit.

The Appellate Court rejected the defendant's argument that the State's closing introduced facts outside of the record and that an expert witness was required to provide

evidence of defendant's BAC. The court properly took judicial notice of the formula found in the Administrative Code, and using that information, the State properly extrapolated defendant's BAC. An expert is unnecessary where the jury could easily determine BAC for themselves by simply dividing two numbers.

People v. Webb, 2018 IL App (3d) 160403 Whether defendant's prior convictions for aggravated battery constituted "forcible felonies" for purposes of armed habitual criminal is a legal question for the court, and need not be put to a jury. Here, the State properly asked the trial court to judicially notice the indictments from defendant's prior aggravated battery convictions and conclude that the convictions were based on great bodily harm, making them forcible felonies. The fact that defense counsel successfully struck the mention of "great bodily harm" from the stipulation and jury instructions did not negate the court's finding.

People v. Messenger, 2015 IL App (3d) 130581 A trial court must take judicial notice of an "adjudicative" fact when requested to do so by a party who supplies the court with any necessary supporting information. Illinois Rule of Evidence 201(d). The judicial notice doctrine extends to facts which, while not generally known, are readily verifiable from sources of indisputable accuracy. A court may take judicial notice of a fact which constitutes an element of the offense. Judicial notice is reviewed for abuse of discretion.

Here, the trial court properly took judicial notice of the fact that the jail complex where a battery occurred was "public property." Outside the jury's presence, a witness testified that Whiteside County owned the complex and that the area where the battery occurred was not open to the public.

Under **Apprendi**, any fact other than a prior conviction which increases the maximum penalty for a crime must be charged, submitted to a jury, and proven beyond a reasonable doubt. The court found that taking judicial notice of an element of a crime does not violate **Apprendi** so long as the jury has the option to accept or reject the fact concerning which judicial notice was taken. In addition, an IPI instruction (Criminal 4th No. 1.01) informs the jury that it need not accept as conclusive any fact that has been judicially noticed.

The trial court failed to give IPI Criminal 4th No. 1.01, and instead gave a non-IPI instruction stating that the "entire county jail is public property." The court found that the failure to give the IPI instruction constituted error, but that error was harmless in light of the overwhelming evidence of guilt, the trial court's oral admonishment to the jury during trial that the court had taken judicial notice that the jail was public property but that judicially noticed facts are not conclusive, and the inability of the defense to produce any evidence to rebut the fact that the jail was public property.

§19-22(c)
Improper Judicial Notice

It is improper to take judicial notice of the following:

That improper methods are used to obtain confessions. **People v. Lewis**, 32 Ill.2d 391, 207 N.E.2d 65 (1965).

That a "true-tone" color T.V., which projected only a black and white picture, was worth more than $150. **People v. Scott**, 59 Ill.App.3d 864, 376 N.E.2d 375 (2d Dist. 1978).

Of abbreviations peculiar to particular trades or professions and not known by the general public, or of any other abbreviation not in general use. **People v. Allen**, 8 Ill.App.3d 176, 289 N.E.2d 467 (3d Dist. 1972).

That in some areas of Chicago it is necessary for a person to be armed. **People v. Wade**, 71 Ill.App.2d 202, 217 N.E.2d 329 (1st Dist. 1966).

That on September 18 at 5:00 a.m., it is "quite bright out" (**People v. McDonald**, 46 Ill.2d 92, 263 N.E.2d 75 (1970)).

The contents of a weather report for a day two months previously. **Cook County Department of Environmental Control v. Tomar**, 29 Ill.App.3d 751, 331 N.E.2d 196 (1st Dist. 1975).

That cannabis is polytypic. **People v. Krall**, 29 Ill.App.3d 86, 329 N.E.2d 441 (4th Dist. 1975).

Of the proceedings in the lower court in a different case. **People v. Washington**, 81 Ill.App.2d 901, 225 N.E.2d 472 (1st Dist. 1967) (aff'd 41 Ill.2d 16, 241 N.E.2d 425 (1968)).

Illinois Appellate Court

People v. Smith, 2021 IL App (1st) 190421 At defendant's trial on charges of armed habitual criminal and UUW/felon, the defense refused to stipulate that certified statements of prior convictions – one bearing defendant's name, "Rashawn Smith," the other bearing the name "Rashawn T. Smith" – proved the necessary qualifying convictions of the charged offenses. The State did not present any testimony verifying that these convictions involved the same defendant, and no date of birth corroborated the matching name. The trial court found defendant guilty. During post-trial motions, the court took judicial notice of matching IR numbers, and denied the motion.

On appeal, the certified statements of conviction were not a part of the appellate record. While appellant has a duty to present a sufficient record, and an incomplete record will trigger a presumption favorable to the appellee, the rule is relaxed where the appellant bears no fault for the incomplete record. Here, appellate counsel explained that many attempts were made to obtain the records, but the impound order did not list the statements of conviction and the trial attorneys were unable to produce them. The Appellate Court held that counsel presented sufficient evidence of due diligence in attempting to obtain the records, so it would not indulge a presumption in favor of the appellee or resolve any doubts against the appellant.

Turning to whether the State proved defendant's prior convictions beyond a reasonable doubt, the general rule for purposes of certified statements of conviction is that identity of name gives rise to a rebuttable presumption of identity of person. For one of the prior convictions, however, the certified statement of conviction did not match defendant's name; rather, it contained an extra middle initial. While the State charged defendant in the instant case with an AKA referencing the name with the middle initial, this was legally insufficient to prove defendant was the same "Rashawn T. Smith" that was convicted in the prior case. Furthermore, the court erred in taking judicial notice of the IR numbers *sua sponte* after the close of evidence. Once the parties rested, the court was obligated to rule on the evidence presented at trial. Thus, the State failed to prove defendant committed one of the prior convictions cited as an element of AHC, and that conviction was reversed. The second prior, which did not include the middle initial, was subject to the presumption of identity because the names matched. Defendant did not rebut this presumption, so the court upheld defendant's conviction for UUW/felon.

People v. Shamhart, 2016 IL App (5th) 130589 Defendant raised several claims of ineffective assistance of his trial counsel in documents filed after he was convicted. The court appointed new counsel to represent defendant but would not allow defendant to testify at an

evidentiary hearing in support of his claims. Instead, the court said it would take judicial notice of defendant's filings.

In finding that the trial court improperly denied defendant the opportunity to present evidence in support of his claims, the Appellate Court rejected the State's argument that there was no need for an evidentiary hearing because the trial court took judicial notice of the defendant's filings.

Under the Illinois Rules of Evidence, judicial notice only applies to facts that are not subject to reasonable dispute. Ill. R. Evid. 201. Here, the documents filed by defendant raised a multitude of issues, and the court did not believe "the State would stand idly by and have no response" to defendant's claims, thereby conceding those claims. The factual allegations were thus not proper subjects for judicial notice.

The cause was remanded for an evidentiary hearing on defendant's post-trial claims.

In re S.M., 2015 IL App (3d) 140687 Defendant was charged in juvenile court with unlawful possession of a concealable handgun by a person under 18 years of age. 720 ILCS 5/24-3.1(a)(1). The State did not present any evidence establishing defendant's age, which was an element of the offense. During closing argument, defendant pointed out this failure, and in rebuttal the State asked the trial court to take judicial notice of the court record showing that the court's juvenile jurisdiction attached for minors under 18 years of age. The trial court agreed with the State, finding that as a matter of jurisdiction defendant was under 18, otherwise he would have been tried in adult court.

The Appellate Court reversed defendant's adjudication, holding that the State failed to prove defendant was under 18, an element of the offense, and that the trial court could not properly fill in that missing proof by taking judicial notice of defendant's age.

Illinois Rule of Evidence 201 allows a trial court to take judicial notice of certain facts which are not subject to reasonable dispute, meaning they are generally known in the local population or are capable of accurate and ready determination by consulting sources of unquestioned accuracy. A court may take judicial notice of its own records, including the status of pleadings in a juvenile proceeding.

The State charged defendant in juvenile court, which has exclusive jurisdiction to adjudicate criminal offenses committed by minors under the age of 18, and defendant did not file a motion to dismiss the charges. But procedural silence regarding allegations in a charging document cannot be construed as a judicial admission to an element of the offense. The failure of defendant to contest specific allegations in the charge did not absolve the State of its obligation to prove the elements of an offense.

Additionally, defendant's age was not technically a jurisdictional requirement since juvenile court is simply a division of the circuit court. Defendant's silence with respect to jurisdiction thus did not constitute an admission that he was under 18 at the time of the offense.

The Appellate Court rejected the State's argument, made for the first time on appeal, that the trial court could fill in the State's missing proof by taking judicial notice of defendant's unsworn statement during arraignment that he was 16 years old. Not only was the statement unsworn, it was also self-incriminating, since defendant gave the answer in response to a direct question from the court about his age, an element of the offense. If this statement could be considered on appeal to provide the necessary proof of age, it would prevent defendant from any meaningful opportunity to challenge this element at trial, or to challenge the admission of his statement as violating his right against self-incrimination.

The Appellate Court also held that the trial court could not take judicial notice of an adjudicative fact without first reopening the evidentiary portion of the trial. Here, defendant

pointed out the missing proof during its closing argument. The State was not entitled to have a "do-over" by asking the court in its rebuttal argument to supplement the completed evidence pursuant to judicial notice.

Defendant's conviction was reversed.

People v. Boykin, 2013 IL App (1st) 112696 A reviewing court may take judicial notice of matters not previously presented to the trial court when the matters are capable of instant and unquestionable demonstration. A reviewing court will not take judicial notice of critical evidentiary material not presented to and not considered by the fact finder during its deliberations.

In a prosecution for delivery of a controlled substance within 1,000 feet of a school, evidence of the school's closure is critical material that was not presented to the trier of fact. Therefore the Appellate Court declined to take judicial notice of the school's closure based on newspaper articles and a news release.

People v. Love, 2013 IL App (3d) 120113 Illinois Rule of Evidence 201 governs judicial notice of adjudicative facts and provides that judicial notice may be taken at any stage of a proceeding. When a court allows a party's request to prove an adjudicative fact by judicial notice in a criminal proceeding, "the court shall inform the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." Ill. R. Evid. 201(g). This directive is rooted in the criminal defendant's constitutional right to a jury trial.

Outside the presence of the jury in a DUI prosecution, the court took judicial notice that the applicable conversion factor for blood serum alcohol content to whole blood alcohol content is 1.18, as provided by the Illinois Administrative Code. Over objection, the court gave the jury this non-IPI instruction regarding the conversion factor:

> In the course of this case, you have heard testimony about the results of a blood draw. There are two ways to measure blood alcohol concentration: by serum levels or by what is called whole blood. Whole blood is [the] standard used by law enforcement and legal proceedings, and it can be calculated by converting the serum level to the whole blood equivalent. In this case, the testimony was that the serum level was .190. The blood serum or blood plasma alcohol concentration results will be divided by 1.18 to obtain a whole blood equivalent. After conversion, the whole blood equivalent is .161.

This instruction violates Ill. R. Evid. 201. It contains no cautionary language advising the jury that it was not mandated to accept the identified conversion factor or adopt the calculations based on a formula using this factor. It also referenced a contested fact, defendant's purported blood serum level, that was not subject to judicial notice, and in this respect became testimonial.

The error was not harmless. A separate instruction informed the jury that *if* it found defendant's alcohol level was greater than 0.08, it *may* presume that defendant was under the influence of alcohol. The judicial notice instruction did not contain similar limiting language that the jury was not required to conclude that defendant's blood alcohol level was .161. The jury could have easily viewed the defective instruction to require it to find that defendant's blood alcohol level was twice the level that supported a strong but permissive presumption of intoxication.

People v. Rubalcava, 2013 IL App (2d) 120396 Defendant was charged with having unlawful contact with a street gang member for having direct contact with Antonio Delgadillo. (725 ILCS 5/25-5(a)(3)). To establish guilt, the State was required to prove beyond a reasonable doubt that defendant had contact with a street gang member after being ordered in a non-criminal proceeding to refrain from such contact. A "streetgang member" is defined as a person who "actually and in fact belongs to a gang." (740 ILCS 147/10).

The Appellate Court reversed the conviction on reasonable doubt grounds. In the course of its holding, the court held that it would have been improper for the trial judge to take judicial notice of the evidence presented in a civil case in which a different trial judge found that Delgadillo was "more likely than not" a gang member. The parties did not dispute that the trial court properly took judicial notice of the finding that Delgadillo was "more likely than not" a gang member.

Under Illinois Rule of Evidence 201(b), a judicially noticed fact must not be subject to reasonable dispute in that it is either: (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. The court concluded that the evidence in the civil case - police testimony and descriptions of photographs of purported gang members - did not satisfy this standard, particularly since Delgadillo disputed it in both the civil and civil trials.

In addition, although a court may take judicial notice of matters of record, taking judicial notice does not permit the admission of hearsay evidence which would otherwise be prohibited. Testimony in a previous action is admissible in a subsequent proceeding if the witness is dead, insane, or so ill that he cannot travel, or if he is "kept out of the way by the adverse party." Testimony from a prior proceeding is not admissible through judicial notice.

The court rejected the argument that defendant waived the issue and in effect stipulated to use of the evidence in the civil case where he agreed that the trial court could take judicial notice of matters of record. In the absence of a stipulation or a clear forfeiture, the trial court could take notice only of matters that were properly subject to judicial notice. Defendant's recognition of the fact that the trial court could take judicial notice of its own records did not constitute an agreement that all of the evidence presented in the civil case could be considered against him substantively in the criminal case.

People v. Spencer, 408 Ill.App.3d 1, 948 N.E.2d 196 (1st Dist. 2011) A reviewing court may take judicial notice of factual evidence when the facts are capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy.

The Appellate Court refused to take judicial notice that a high school parking lot was not open to the public and was reserved for registered parking by students and faculty. The website that the State referenced for this information contained forms for the 2010-11 school year and did not show that the parking policies were in effect in 2006 when defendant was arrested.

§19-23
Opinion Testimony

§19-23(a)
Opinions of Lay Witnesses

Illinois Supreme Court

People v. Heineman, 2023 IL 127854 Defendant was charged with two counts of aggravated DUI, one alleging that he operated a motor vehicle while the alcohol concentration in his blood was .08 g/dl or greater, and the other alleging that he operated a motor vehicle while under the influence of alcohol. At trial, there was evidence that a blood draw was done at the hospital, and it revealed that defendant's serum alcohol was 155 mg/dl. A police officer then testified that a serum alcohol level of 155 mg/dl equated to a whole blood alcohol level of .131 g/dl. The officer said he calculated the whole blood alcohol concentration by using a "conversion factor" of 1.18, which he based on Section 1286.40 of the Illinois Administrative Code. Defense counsel objected to this testimony on the ground that the officer was not an expert in toxicology, but the objection was overruled. Defendant was convicted of both counts.

Defendant argued on appeal that the State failed to introduce competent evidence to prove that his whole blood alcohol concentration was greater than .08 g/dl because the officer was not an expert. While the appellate court affirmed, the Illinois Supreme Court agreed with defendant. The conversion factor is a scientific fact, and is not a proper subject for lay witness testimony.

In reality, there is not a single conversion factor; instead there is a scientifically acceptable range of possible conversion factors (generally between 1.12 and 1.20). While Section 1286.40 of the Administrative Code purports to establish a conversion factor, expert testimony is required to establish the scientifically acceptable range of conversion factors and to establish that the 1.18 factor set forth in Section 1286.40 falls within that range. Here, the officer's testimony that he applied a mathematical formula to convert defendant's blood serum alcohol concentration to its whole blood equivalent, without any scientific basis, was insufficient to prove defendant's whole blood alcohol concentration. The court reversed defendant's conviction on the .08 g/dl count.

But, the court upheld defendant's other aggravated DUI conviction, which was predicated on his driving while under the influence of alcohol. While the jury was instructed it could presume that defendant was under the influence if it found that his blood alcohol concentration was 0.08 g/dl or greater, the jury was not required to make that presumption. And, there was ample other evidence from which a rational trier of fact could find that defendant was under the influence of alcohol, including testimony that defendant had consumed several alcoholic drinks before the accident, that he was intoxicated, and that his eyes were glassy and he was behaving out-of-character on the night in question. Additionally, the jury could consider the testimony of the emergency room doctor that defendant's serum alcohol level was "consistent with intoxication." Thus, the court concluded that the improper admission of the officer's testimony as to the conversion factor was harmless with regard to defendant's alternate conviction.

People v. Thompson, 2016 IL 118667 Under Illinois Rule of Evidence 701, lay opinion identification testimony is admissible if the testimony is (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or a determination of a fact in issue. When the identification is being made from a video recording or a photograph, both of which the jury is able to view for itself, the court held that such testimony is helpful where there is some basis for concluding that the witness is more likely to correctly identify the defendant than the jury.

It is not necessary to show that the witness has had sustained contact or intimate familiarity with, or special knowledge of the defendant. Instead, the witness must only have had contact with the defendant beyond what the jury has had to achieve a level of familiarity that would make the opinion helpful.

Courts should use a totality of circumstances approach in deciding whether such testimony is admissible, and should consider the following factors in making that decision: (1) the witness's general familiarity with the defendant; (2) the witness's familiarity with the defendant at the time the recording was made; (3) whether the witness observed the defendant dressed in a manner similar to the person depicted in the recording; (4) whether the defendant was disguised in the recording or changed his appearance between the time of recording and trial; and (5) the clarity of the recording and extent to which the person is depicted.

The absence of any of the above factors does not render the testimony inadmissible. And the extent of a witness's opportunity to observe the defendant goes to the weight, not admissibility, of the evidence.

Additional rules apply when lay opinion identification testimony is presented by law enforcement officers. Here, there is an added concern that evidence of the officer's relationship with defendant may end up revealing defendant's prior criminal history. The court therefore adopted certain precautionary procedures when officers provide opinion identification testimony.

When the State seeks to introduce such evidence, the circuit court should permit the defendant to examine the officer outside the presence of the jury so he may explore the officer's level of familiarity as well as any bias or prejudice. When the officer testifies, he may identify himself as a member of law enforcement, but to establish familiarity he should only testify about how long he knew defendant and how frequently he saw him.

Additionally, the court should instruct the jury before the testimony and in the final charge that it need not give any weight to such testimony and that it should not draw any adverse inference from the witness's status as a law enforcement officer.

Here the State introduced lay opinion identification testimony from four witnesses, three of whom were law enforcement officers. The Supreme Court held that the testimony of the three officers was not properly admitted, but the testimony of the civilian witness was proper.

(a) Deputy Sheriff Sandusky interrogated defendant after he was arrested and viewed a video and still image of a man stealing anhydrous ammonia from storage tanks. Sandusky testified that defendant was the person in the images. The court held that Sandusky gained a familiarity with defendant during his interrogation, an interaction that was "in a more natural setting" than the jury would have had from its limited exposure to defendant in the courtroom. Sandusky was thus more likely to correctly identify defendant than the jury. But the trial court failed to employ the precautionary measures required for law enforcement witnesses and thus Sandusky's testimony was improper.

(b) Officer Jackson also identified defendant from the video and still image. But there was no evidence about how long he knew defendant or how often and under what circumstances he had seen him. There was thus no evidence demonstrating any basis for concluding that Jackson was more likely to correctly identify defendant than the jury. And the trial court failed to employ any precautionary measures prior to his testimony. Accordingly, Jackson's testimony was improper.

(c) Officer Huff was able to identify defendant from the video and still image based on his "previous dealings" with defendant. The court held that Huff had "a perspective of defendant that the jury did not have" and thus was more likely to correctly identify him. But his testimony was inadmissible because the court did not employ any precautionary procedures before admitting his testimony.

(d) Jessica Joslin identified defendant from the still image. She had never met or spoken to defendant, but she once saw him sleeping on the front porch of a mutual friend's house when she was "strung out on methamphetamine." The court held that "although close" there was a sufficient basis to conclude that she was more likely to correctly identify defendant than the jury. And because Joslin was not a law enforcement officer, the trial court did not have to employ any precautionary procedures. Joslin's testimony was thus admissible.

Although the court found that the testimony of the three officers was inadmissible, it held that the error was harmless. Defendant's conviction was affirmed.

People v. Terrell, 185 Ill.2d 467, 708 N.E.2d 309 (1998) A witness, whether expert or lay, may provide an opinion on the ultimate issue in a case. The trier of fact is not required to accept the witness's conclusion, which therefore cannot be said to usurp the province of the jury.

People v. Novak, 163 Ill.2d 93, 643 N.E.2d 762 (1994) In a prosecution for aggravated criminal sexual assault, lay witnesses who were familiar with "the field of strength training and exercising" were properly allowed to testify that the exercises defendant required of his baseball players were not appropriate.

Such testimony could not be admitted as the opinions of lay witnesses; the opinion of a non-expert is admissible only to the extent it is: (a) rationally based on the witness's firsthand perception, and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. Lay witness opinion is admissible where "the facts could not otherwise be adequately presented or described in such a way as to allow the fact finder to form an opinion or reach an intelligent conclusion."

Because neither witness saw the defendant administer any of the exercises, they lacked firsthand knowledge on which to base their opinions. Instead, their conclusions were based on literature presented at trial and responses to hypothetical questions, two types of evidence reserved for opinion testimony by experts.

However, the Court also concluded that the testimony of both witnesses should have been admitted as expert testimony. (See discussion at §19-23 below).

People v. Enis, 139 Ill.2d 264, 564 N.E.2d 1155 (1990) Generally, a witness may only testify to facts within his own personal knowledge and recollection, and may not draw inferences, speculate about matters beyond his personal knowledge, or judge the veracity of other witnesses or evidence.

Illinois Appellate Court

People v. Longs, 2024 IL App (4th) 230501 The trial court did not err when it allowed two police officers to give lay opinion testimony identifying defendant as the perpetrator of a shooting incident that was captured on surveillance video. The trial court followed the "precautionary procedures" set out in **People v. Thompson**, 2016 IL 118667, before ruling the testimony admissible, including affording the defense an opportunity to examine the officers outside of the presence of the jury and instructing the jury that it was to determine what weight, if any, to give to the officers' identification testimony. And, while **Thompson** identified five factors to be considered in its totality-of-the-circumstances analysis, where at least one of those factors is present there is a basis to conclude that the lay witness is in a superior position to the jury to identify defendant from the video evidence. Here the factor that the officers were familiar with defendant prior to the incident was undisputed. Further,

while the video itself was high quality, it was also "choppy" and only showed the shooter's face on a few occasions. Thus, the officers' identification testimony was helpful to the jury and was properly admitted.

People v. Logan, 2022 IL App (4th) 210492 Defense counsel did not perform deficiently by failing to object to an officer's testimony as improper lay opinion in violation of Illinois Rule of Evidence 701. The officer testified that when he was at defendant's residence in response to her 911 call about her young son's death, defendant "appeared upset" but "it seemed...forced." The officer also stated that defendant seemed to be mimicking the sound of crying.

Relying on **People v. Martin**, 2017 IL App (4th) 150021, the appellate court concluded that this was not improper opinion testimony because it was the officer's past opinion of what he observed while he was at the scene. It was not offered as a present opinion and thus was not improper lay opinion testimony. And, even if it was improper opinion testimony, there was no prejudice where the court found the evidence against defendant overwhelming such that there was no reasonable probability the outcome would have been different had counsel successfully sought to bar the officer's testimony.

People v. Price, 2021 Il App (4th) 190043 It was not error to allow EMT to testify that he observed "obvious" rigor mortis when he examined the victim's body at the scene where it was found. The EMT testified about his training and experience in the signs that a person is dead and explained that he was trained that rigor mortis is one of those signs. This provided an adequate foundation for the EMT to offer an expert opinion on rigor mortis.

And, while not presented as such in the trial court, the EMT's testimony could have been admitted as a lay opinion based on his personal observation under Illinois Rule of Evidence 701. The witness did not provide a technical definition of the term "rigor mortis," and a lay person understands that term to refer to the stiffness of a body that sets in after death. Further, other witnesses testified that the body was cold and stiff when it was found.

People v. Walker, 2021 IL App (4th) 190073 At defendant's trial for predatory criminal sexual assault, the complainant's father testified that he was suspicious of defendant based on the time defendant spent with the complainant. The prosecutor asked the complainant's father how news of the complainant's allegations affected him emotionally. He testified that it made him "sick," that he didn't want to believe it, and that it confirmed his suspicions. Defendant, asking for plain error review, alleged that the court erred in admitting this testimony. He alleged the prejudicial effect of the father's testimony about his emotional reaction outweighed its probative value, that the father's description of his suspicions constituted improper lay opinion testimony, and that the father's beliefs as to what occurred improperly opined on the ultimate question of fact for the trier of fact.

The Appellate Court disagreed. The father provided several concrete examples of observations that had aroused his suspicion, and Rule of Evidence 701 expressly permits a witness to testify about his or her perceptions. His emotional reaction represented his state of mind at the time of the disclosure, another proper area of testimony that was relevant to provide context for his decision to subsequently confront defendant. Notably, state of mind testimony is admissible even if hearsay; here, the witness was on the stand and available for cross-examination. Finally, it is now "well settled" that expert or lay witness opinions on an ultimate fact or issue are admissible.

People v. Hardimon, 2021 IL App (3d) 180578 Defendant was convicted of murder after he was identified as the perpetrator of a shooting outside a night club. At his trial, one witness, a bouncer, testified that as he escorted defendant out of a club, he heard defendant say he would "light this bitch up." The bouncer testified that based on his familiarity with street slang, he understood the comment to mean that there would be some "gun play." Defendant argued on appeal that this comment constituted improper lay opinion testimony. Defendant further alleged that aspects of his videotaped statement, in particular the commentary and accusatory questioning of the officers, was overly prejudicial.

The Appellate Court rejected these claims. Illinois Rule of Evidence 701 states that "lay witnesses may offer opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge." The Appellate Court found the bouncer's testimony was proper lay opinion. It was rationally based on his familiarity with street vernacular. The statement was helpful to the determination of the fact of the defendant's guilt in that there was, in fact, some "gun play." The statement was not based on scientific, technical, or specialized knowledge.

Nor did the court err in admitting certain portions of defendant's videotaped interrogation which he alleged to be overly prejudicial. In a prior appeal, the appellate court deemed the interrogation prejudicial, based on officer comments and accusations, after approximately 26 minutes. At the second trial, the parties argued over whether the jury should see beyond the 25:46 mark or the 28:35 mark. In between, the interrogating officers presented defendant with their theory of the case, accusing him of shooting the victim after an argument in the bathroom of the nightclub, and told defendant a witness could identify him entering a Mitsubishi after the shooting. The Appellate Court found these officer statements admissible as allowable interrogation techniques, and noted that defendant admitted to being in the Mitsubishi, making this portion of the interrogation relevant.

People v. Suggs, 2021 IL App (2d) 190420 At defendant's trial on two counts of domestic battery, the purported victim of the offense testified that scratches on her arm were the result of defendant's efforts to keep her from falling while she was intoxicated and that defendant had not pushed her or scratched her as alleged in the charges. The responding officer's body camera video was played and showed that when the purported victim was asked if a cut on her arm was from defendant, she responded "...she grabbed my hand. But it's fine." The purported victim also said, "She pushed me. She grabbed me, I guess," and "I put my arm up." The officer then testified that it was his opinion that the offense of domestic battery had been committed. Defendant was found guilty of domestic battery on the count involving bodily harm (scratches on the arm) and not guilty of the count involving insulting or provoking conduct (pushing).

It was error for the police officer to testify to his opinion that a crime had been committed. The court rejected the State's argument that the officer's testimony was a statement of his prior opinion and thus permissible under the reasoning of **People v. Degorski**, 2013 IL App (1st) 100580. The officer was specifically asked, "in your opinion, what crime had occurred?" The Appellate Court concluded that the jury likely understood this as a reference to the officer's current opinion rather than a past opinion. The testimony was therefore improper. And, the evidence was closely balanced, warranting plain error review despite defendant's failure to preserve the issue. Defendant's conviction was reversed, and the matter was remanded for a new trial.

People v. Stitts, 2020 IL App (1st) 171723 The trial committed plain error when it admitted police identification testimony without abiding by the rules set forth in **People v. Thompson**, 2020 IL App (1st) 171723. At trial, the State published a surveillance video while a detective was on the stand. The detective explained the video to the jury as they watched, identifying defendant as having the man shown on the screen with a handgun. Because the trial court did not allow the defense to conduct preliminary cross-examination on the officer's familiarity with the defendant, limit the testimony before the jury (rather than allow the detective to mention prior investigative alerts), and instruct the jury, it plainly violated **Thompson.**

The court also found the evidence closely balanced. No eyewitnesses identified defendant as the shooter, and although he was found nearby with a gun and residue on his hand, the State did not establish that he actually fired, rather than simply held, the gun.

People v. Loggins, 2019 IL App (1st) 160482 At defendant's trial for PCS with intent to deliver, a police officer explained the significance of various purported tools of the trade found in defendant's apartment, including baggies, blenders, and cutting agents. The officer concluded that these items were suggestive of drug dealing. On appeal, defendant alleged this was improper expert testimony, and inadmissible because the State did not tender the officer as an expert.

The Appellate Court analyzed the distinction between lay and expert opinion, as delineated in Rules of Evidence 701 and 702. It concluded that an officer's lay opinion must be confined to matters of personal observation, and not include specialized knowledge or expertise. When the officer gives an opinion based on experience and training over the years, however, the testimony becomes an expert opinion. Here, the officer explicitly cited his experience when giving his opinion that the items in defendant's apartment are used for dealing drugs. Thus, the State should have tendered the officer as an expert before eliciting his opinion. Any error, however, was harmless where the qualifications the officer did testify to (five years as a narcotics investigator and annual training), clearly rendered him eligible to give an expert opinion, and where the evidence was sufficient even without his opinion.

People v. Whitfield, 2018 IL App (4th) 150948 Admission of defendant's video recorded interrogation was not error even though the recording also included statements by the interrogating officers suggesting that defendant was not credible and opining that the State's case against him was strong. The officers' statements on the video were not offered for their truth, and provided context for the interrogation, so they were not hearsay. Similarly, the officers' statements were not improper opinion testimony because the video recording was not testimony. Unlike **People v. Hardiman**, 2017 IL App (3d) 120772, where the court improperly admitted portions of an interrogation consisting of prejudicial police accusations and defendant's denials, the defendant here made admissions throughout the duration of the videotaped statement, rendering the officers' accusations relevant.

People v. Mister, 2016 IL App (4th) 130180-B After noting a conflict in authority between jurisdictions and within the Appellate Court, the court concluded that a lay witness may give an opinion concerning the identity of a person depicted in a surveillance video where there is a basis to believe that the witness is more likely than the jury to correctly identify the individual in the videotape. The court rejected holdings that the witness must have prior familiarity with the subject in order to testify concerning his or her identity, finding that the

witness's degree of familiarity with the subject goes to weight rather than admissibility. The court also rejected the argument that such testimony is admissible only if the subject's appearance has changed between the time the videotape was made and the trial.

The court concluded that a casino security guard's testimony concerning the actions of two persons on a surveillance video was admissible although the guard was not present when the video was made and did not observe the events that were depicted. The court concluded that the guard's testimony was rationally based on opinions he had developed by repeatedly viewing the video.

In addition, the testimony aided the trier of fact by providing a clear understanding whether the two persons were at the casino and left in the same vehicle. The court noted that the video contained nearly four hours of footage, lacked clarity, was difficult to assess, and involved "fluid scenes and numerous individuals and vehicles." Thus, in the absence of the guard's opinion testimony, the jury would likely miss details concerning the events captured by the camera.

The court found that the testimony did not invade the province of the jury where the guard merely linked the individuals in the video to still photographs which had been taken the same night. Whether the defendant in the courtroom was the person who was depicted in the video was left to the jury's determination.

Finally, the court noted that the weight to be given to the opinion testimony was for the trier of fact to assess. Defense counsel extensively cross-examined the guard and had an opportunity to highlight any deficiencies in the testimony regarding the witness's familiarity with the defendant or the clarity of the videotape. Under these circumstances, the province of the jury was not compromised.

People v. O'Donnell, 2015 IL App (4th) 130358 The trial court improperly allowed a police officer to testify that she believed defendant, who was convicted of driving under the influence of alcohol, was lying when he stated he had not been driving at the time of the accident. The officer testified that whenever she asked defendant if he had been driving, he would look away or look down, and in her experience that was a sign of deception.

The Appellate Court held that such "human lie detector" evidence was not admissible. This type of evidence violated the fundamental rule that one witness should not be allowed to express an opinion about another witness's credibility. Accordingly, it was error to admit such evidence.

The court nevertheless affirmed defendant's conviction since he had not objected to the evidence at trial, and since the evidence at trial was not closely balanced, it did not constitute plain error.

People v. Steele, 2014 IL App (1st) 121452 To prove a defendant guilty of aggravated battery based on great bodily harm under 720 ILCS 5/12-4(a), the State must prove the existence of a greater and more serious injury than the bodily harm required for simple battery. The State failed to prove great bodily harm beyond a reasonable doubt. The evidence showed that defendant, while trying to evade a traffic stop, struck a police officer with his car. The medical reports from the hospital showed that the officer was treated for abrasions on his knees and discharged after a few hours. A photograph also showed that the officer had abrasions on his right elbow. These injuries did not constitute great bodily harm.

The officer testified about injuries more severe than abrasions, stating that he had torn ligaments in both knees and his right shoulder, and bone fragments in his right shoulder. These injuries would likely constitute great bodily harm, but since his testimony was not supported by the record, it could not form the basis for finding great bodily harm.

The medical reports did not reflect any of these injuries, and the officer testified on cross that he was not diagnosed with these more serious injuries.

If the officer received a medical diagnosis showing more serious injuries than were initially identified, then the State needed to offer scans, X-rays, medical reports, or medical testimony to show that diagnosis. Where the question of causation is beyond the general understanding of the public, the State must present expert evidence to support its theory of causation.

Because the officer was treated and released from the hospital with only abrasions and bruising, the cause of the more serious injuries he testified about would not be readily apparent based on common knowledge and experience. Expert testimony was thus required to show that the more serious injuries were caused by the blow from defendant's car.

Additionally, while the officer was competent to testify about his physical condition since the incident, he was not competent to testify about a medical diagnosis of torn ligaments and bone fragments. Because the officer's testimony was the only evidence of the more severe injuries, and no medical evidence supported his testimony, the State failed to prove that the officer suffered great bodily harm.

The conviction was reduced to simple battery and remanded for a new sentencing hearing.

People v. Jaynes, 2014 IL App (5th) 120048 The trial court did not abuse its discretion by allowing a detective who possessed no expertise in handwriting comparison to testify concerning his opinion about distinctiveness and similarities in handwriting. A witness who is not testifying as an expert may give opinion testimony where the opinion is rationally based on the perception of the witness, helpful to a clear understanding of the witness's testimony or determination of a fact in issue, and not based on scientific, technical or other specialized knowledge.

The detective examined two labels and stated that the "E's" on the labels were distinctive and similar. The Appellate Court found that the trial court did not abuse its discretion by allowing such testimony, noting that the detective's opinion was based on personal observation, was one that a non-expert is generally capable of making, and was helpful to a clear understanding of his remaining testimony. In addition, the detective stated only that some of the "E's" appeared to be similar, not that they were all the same or that he believed they had all been written by defendant.

The conviction for possession of child pornography was affirmed.

People v. Richardson, 2013 IL App (2d) 120119 As a matter of first impression, the court found that at a jury trial for unlawful possession of a weapon by a felon while wearing body armor, the trial judge properly admitted a police officer's lay opinion that a vest worn by the defendant qualified as "body armor." The officer testified that the vest had the same fit and style as the armored vest the officer wore every day. In addition, the officer removed the vest's inserts and testified that they were intended to cover vital organs and protect such areas from bullets. Thus, the officer did not merely give an opinion that the vest was body armor, but demonstrated to the jury the basis for that conclusion.

The court rejected defendant's argument that because the vest was not submitted for scientific testing, it was impossible for the jury to conclude that it was not "fake body armor." The court found that the argument was based on pure speculation, as there was no evidence to support a conclusion that the body armor was fake. Furthermore, the officer removed plates from the vest and concluded that they were capable of stopping bullets. Finally,

because the vest was admitted into evidence, the jury could draw its own conclusion about its nature.

Defendant's conviction for unlawful possession of a weapon by a felon wearing body armor was affirmed.

People v. Degorski, 2013 IL App (1st) 100580 Much like police officers, assistant State's Attorneys are authority figures whose testimony may be prejudicial if they inform jurors that they should believe the prosecution's case. But there is a distinction between an assistant State's Attorney testifying to a prior opinion of belief in a defendant's statement at the time it was made, and offering a present opinion of defendant's guilt at trial. Present opinion testimony is improper; previous opinion testimony is permissible.

The testimony of a former assistant State's Attorney that he believed defendant's confession at the time of its making was not a present opinion of defendant's guilt and was permissible.

People v. Jackson, 2013 IL App (3d) 120205 A lay witness's testimony in the form of opinions or inferences is limited to those which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness's testimony, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. Ill. R. Evid. 701.

Generally, a lay witness may not offer an opinion as to the meaning of another's out-of-court statement. It is within the province of the jury to interpret such statements.

A detective testified that defendant's initial statement to him was a lie. This lay opinion testimony was erroneously admitted because it removed from the jury's consideration the veracity of defendant's statement to the police.

The Appellate Court concluded that the erroneous admission of this testimony was not plain error.

People v. Mandarino, 2013 IL App (1st) 111772 Defendant, a former police officer, was prosecuted for aggravated battery after he beat a motorist with a collapsible baton during a traffic stop. On appeal, defendant argued that the trial erred by admitting lay opinion that defendant's use of force against the motorist was unreasonable and unnecessary.

The lay opinion was admissible on two theories - to rebut character evidence and under the doctrine of curative admissibility. The defense introduced character testimony by eliciting evidence of defendant's exceptional performance and service records. Character evidence is generally inadmissible in a criminal trial unless introduced by the defendant, in which case the State is permitted to respond by offering its own character evidence. (Illinois Rule of Evidence 404). Here, the State rebutted the defense evidence of the accused's good character by showing that in light of the incident leading to the instant charges, the witness no longer viewed defendant as an excellent officer.

The evidence was also admissible under the curative admissibility doctrine, which allows the State to respond on redirect examination where the defendant has opened the door to a particular subject, even if the response elicits what would otherwise be inadmissible evidence. The purpose of the curative admissibility doctrine is to shield a party from unduly prejudicial inferences raised by the other side. Whether to allow curative evidence lies in the sound discretion of the trial court.

The court concluded that admitting the lay opinion of the witness, a deputy chief, "allowed the State to cure any impression . . . that [the witness] still regarded [defendant] to be an outstanding officer."

People v. Sykes, 2012 IL App (4th) 111110 Lay opinion testimony is not objectionable because it embraces an ultimate issue to be decided by the trial of fact, but it should be excluded when it consists of inferences and conclusions that can be drawn by the trier of fact. Whether it is proper for a witness to narrate the contents of a video of which he has no personal knowledge is a legal issue involving no exercise of discretion, fact finding, or evaluation of credibility. Therefore, the issue is subject to *de novo* review.

A surveillance video that was of very poor quality and was difficult to watch was admitted as substantive evidence and thus spoke for itself. A witness who had no personal knowledge of the events at issue testified that the video depicted defendant removing money from a cash register. This testimony invaded the province of the jury because the witness was in no better position than the jury to determine what the video depicted.

People v. McCarter, 2011 IL App (1st) 092864 While a witness may testify to statements made to her by the defendant, a witness may not offer her personal opinion of the meaning of those statements. Therefore, while the State could admit evidence that defendant told a witness, "It's going down," and that he was going to "take care of business," it could not admit the witness's opinion as to what she thought defendant meant by these statements.

Because these inadmissible statements provided the only evidence that a robbery took place, the court concluded that defense counsel was ineffective in failing to object to the evidence, thus also satisfying the second prong of the plain-error rule. "Based on plain error [the court] exercised [its] duty to set aside the armed robbery conviction where reasonable doubt remains of defendant's guilt."

People v. Latimer, 403 Ill.App.3d 595, 935 N.E.2d 1037 (2d Dist. 2010) Testimony of a lay witness in the form of an opinion may be introduced only if it is helpful to a clear understanding of his testimony or the determination of a fact in issue.

The police videotaped a drug transaction between an informant and a person in a red Pontiac van. After the transaction, the police followed the van but did not see any occupant. The police determined that the van was registered to defendant. Almost two weeks later the informant attempted unsuccessfully to complete another transaction with a white Buick. The police observed defendant exit the Buick after it drove from that meeting. A police officer compared the videotape and a still photograph of the driver of the red van created from videotape with the state ID photo and a booking photo of the defendant and determined that defendant resembled the person in the still photo and the videotape. The trial court ruled that it would not allow the officer to testify at trial that defendant was the driver of the van.

The Appellate Court affirmed this ruling. Whether defendant was the driver of the van was a matter of opinion. The officer had no special expertise in comparing images. His lay opinion would not be helpful to understand the remainder of his testimony or to any fact in issue in the case.

People v. McNeal, 405 Ill.App.3d 647, 955 N.E.2d 32 (1st Dist. 2010) A fingerprint examiner should not be permitted to testify that a print found at the scene matches the fingerprint of the defendant where the examiner did not testify to and made no notes of the points of comparison the examiner found. Absent this foundation, the testimony deprives defendant of the means to challenge the conclusion drawn by the examiner. The court found no plain error because the evidence was not closely balanced and the error did not impact the fairness of the trial. **People v. Robinson**, 368 Ill.App.3d 963, 859 N.E.2d 232 (1st Dist. 2006) The trial judge erred by refusing to allow a lay witness to give his opinion of defendant's sobriety. Lay

witnesses may express their opinion on the issue of intoxication, if that opinion is based on personal observation and familiarity with the signs of intoxication. Because the witness had known defendant for several years and spent several hours with him on the night in question, and testified that defendant consumed no alcohol during that time, his opinion that defendant was not under the influence of alcohol was both relevant and admissible.

People v. Brown, 200 Ill.App.3d 566, 558 N.E.2d 309 (1st Dist. 1990) It was error for the prosecutor to elicit a witness's opinion as to what defendant meant by a remark. A lay witness may only testify as to facts of which he has personal knowledge. A new trial was required because the testimony went to the ultimate question of fact to be decided by the jury. See also, **People v. McClellan**, 216 Ill.App.3d 1007, 576 N.E.2d 481 (4th Dist. 1991) (error to allow police officer to give opinion whether sexual conduct was forced; a lay witness is permitted to testify only as to facts of which he has personal knowledge; opinion testimony from a lay witness is especially prejudicial when it goes to an ultimate question of fact); **People v. Brouder**, 168 Ill.App.3d 938, 523 N.E.2d 100 (1st Dist. 1988) (at trial for resisting arrest, error for police officer to testify that the defendant "resisted us"; testimony constituted a "legal conclusion that should not have been admitted"). Compare, **People v. Jones**, 241 Ill.App.3d 228, 608 N.E.2d 953 (4th Dist. 1993) (at trial for sexual assault, it was not error for police officer to testify that in his experience it is normal for juvenile sexual abuse victims to initially deny having had sexual contact; personal knowledge of the reactions of juvenile sexual abuse victims was adequately shown where officer had 16 years' experience as a police officer and 2½ years as a juvenile investigator; in addition, the opinion was one which could normally be derived by personal observation, was not based on "abstract ideas or theories," and assisted the jury in understanding the officer's testimony and that of the alleged victim).

People v. Williams, 62 Ill.App.3d 996, 379 N.E.2d 1268 (1st Dist. 1978) A lay or non-expert witness is allowed to state an opinion when it is difficult for him to reproduce for the jury the totality of the conditions perceived, and when the opinion is one that ordinary people are accustomed and capable of making.

In other words, when a lay witness cannot easily and clearly describe what he saw, heard or smelled so that it can be clearly understood by the jury, he is allowed to summarize his observations in a statement of conclusion or opinion. For example, it is difficult for a person to describe the odor of dynamite, whiskey or beer without simply stating that he is familiar with such odors and smelled them during the incident in question. Thus, an opinion about such odors is helpful to the jury and is proper testimony.

People v. Linkogle, 54 Ill.App.3d 830, 368 N.E.2d 1075 (3d Dist. 1977) A witness may not voice an opinion or conclusion concerning a third party's statement, but may only recite the statement itself.

People v. Ehrler, 114 Ill.App.2d 171, 252 N.E.2d 227 (2d Dist. 1969) A lay witness is only allowed to voice an opinion based on his personal observation. Unlike an expert, a lay witness may not render an opinion based on facts in evidence or in response to a hypothetical question. See also, **People v. Crump**, 319 Ill.App.3d 538, 745 N.E.2d 692 (3d Dist. 2001) (improper opinion testimony by a lay witness is not prejudicial if the conclusion or testimony is obvious; furthermore, a lay witness may express an opinion based upon personal observation where: (1) it is difficult to reproduce for the jury the totality of the conditions perceived, and (2) the opinion is one that "persons in general are capable of making and

understanding; no rule authorizes the admission of lay opinion testimony to show why a police officer took certain actions).

Lay witnesses may voice opinion on the following:

A person's sanity based upon personally observed facts, which must be stated in detail. **People v. Wright**, 111 Ill.2d 128, 490 N.E.2d 640 (1985); **People v. Bouchard**, 180 Ill.App.3d 26, 535 N.E.2d 1001 (2d Dist. 1989).

A person's intoxication. **People v. Sprinkle**, 74 Ill.App.3d 456, 393 N.E.2d 94 (4th Dist. 1979); **People v. Reeder**, 2 Ill.App.3d 471, 276 N.E.2d 768 (2d Dist. 1971).

A person's age. **People v. Davis**, 10 Ill.2d 430, 140 N.E.2d 675 (1957).

That a person appeared nervous. **Law v. Central Illinois Public Service Company**, 86 Ill.App.3d 701, 408 N.E.2d 74 (4th Dist. 1980).

That an odor following an explosion smelled like dynamite. **People v. Reed**, 333 Ill. 397, 164 N.E. 847 (1929).

That a smell was that of alcohol. **Logue v. Williams**, 111 Ill.App.2d 237, 250 N.E.2d 159 (5th Dist. 1969).

That a floor was "slippery" and a room "dark." **Haymes v. Catholic Bishop of Chicago**, 41 Ill.2d 336, 243 N.E.2d 203 (1968).

The speed of a motor vehicle. **Delany v. Badame**, 49 Ill.2d 168, 274 N.E.2d 353 (1971); **People v. Singletary**, 73 Ill.App.3d 239, 391 N.E.2d 440 (1st Dist. 1979).

That a substance was a blood stain. **People v. Preston**, 341 Ill. 407, 174 N.E. 383 (1930); **People v. Frink**, 59 Ill.App.3d 51, 374 N.E.2d 1311 (4th Dist. 1978).

The value of property where the witness has sufficient knowledge to give a reasonable estimate. **People v. Harden**, 42 Ill.2d 301, 247 N.E.2d 404 (1969); **Martin v. McIntosh**, 37 Ill.App.3d 526, 346 N.E.2d 450 (5th Dist. 1976); **Department of Public Works and Buildings v. Hufeld**, 68 Ill.App.2d 120, 215 N.E.2d 312 (3d Dist. 1966).

The size, weight, color, time, distance, speed and value of property. **People v. Singletary**, 73 Ill.App.3d 239, 391 N.E.2d 440 (1st Dist. 1979); **People v. Burton**, 6 Ill.App.3d 879, 286 N.E.2d 792 (1st Dist. 1972).

Lay witness may not voice opinion on the following:

That substance was marijuana. **People v. Park**, 72 Ill.2d 203, 380 N.E.2d 795 (1978).

The time needed to drive to a certain location, in the absence of a proper foundation. **People v. Wallenberg**, 24 Ill.2d 350, 181 N.E.2d 143 (1962).

That the defendant acted as if he had something more than usual on his mind. **People v. Hamilton**, 286 Ill. 390, 109 N.E. 329 (1915).

The speed of a vehicle when based upon physical evidence observed after the incident. **Deaver v. Hickox**, 81 Ill.App.2d 79, 224 N.E.2d 468 (4th Dist. 1967).

That eyeglasses caused headaches. **Hawkins v. Richardson**, 29 Ill.App.3d 597, 31 N.E.2d 201 (1st Dist. 1975).

§19-23(b)
Opinions of Expert Witnesses

United States Supreme Court

Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) **Daubert v. Merrell Dow Pharmaceuticals**, 509 U.S. 579 (1993), which held that under Federal Rule of Evidence 702 scientific testimony may be admitted at federal trials only if it is both relevant and reliable, applies not only to "scientific" testimony but to all expert testimony. In addition, the specific factors of reliability mentioned in Daubert (i.e., whether

a theory or technique can be and has been tested and subjected to peer review and publication; whether with respect to a particular technique there is a high "known or potential rate of error"; whether there are "standards controlling the technique's operation"; whether the theory or technique enjoys "general acceptance" within the relevant scientific community) are merely descriptive and not a definitive checklist to determine whether expert evidence is admissible. Instead, **Daubert** requires a "flexible" inquiry that depends on the particular circumstances of the case involved.

On review, the abuse of discretion standard applies to the trial court's determination to admit or exclude expert testimony under **Daubert**.

Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2876, 125 L.Ed.2d 469 (1993) **Frye v. U.S.**, 293 F. 1013 (1923), which bars expert opinion based on a scientific technique unless that technique is generally accepted as reliable in the relevant scientific community, has been superseded by the Federal Rules of Evidence, which authorize the admission of expert testimony that is reliable and relevant.

A trial judge may consider many factors in deciding whether evidence is reliable. While the acceptance of a scientific technique is not a prerequisite to the admission of expert testimony, it is a valid consideration in determining reliability.

Illinois Supreme Court

People v. Pingelton, 2022 IL 127680 The supreme court found the circuit court violated due process when it granted the State's motion to dismiss a post-conviction petition at the second stage without adequate notice. However, any error was harmless due to the frivolousness of the underlying claims.

Defendant filed a post-conviction petition and was appointed counsel. The State moved to dismiss. Two years later, counsel moved to withdraw after concluding that the petition was frivolous. Defendant filed written responses to the motion to withdraw, and counsel filed a reply. The circuit court set the case for a status hearing. On the day of the status hearing, with the attorneys present and defendant participating over telephone, the State argued its motion to dismiss, and "adopted" the arguments in the motion to withdraw. Post-conviction counsel did not respond to the arguments. The court then heard defendant's and his attorney's arguments on the motion to withdraw. The circuit court granted the motion to withdraw, and the motion to dismiss.

The supreme court found this procedure violated due process. A circuit court may not "convert a status call to a hearing on the merits without notice to the parties." Here, the circuit court, on a status date, heard arguments and ruled on both a motion to dismiss and a motion to withdraw. While defendant had already filed written responses to the motion to withdraw, and was able to argue the motion to withdraw at the hearing, he did not argue against the motion to dismiss. Nor could he, as he was still represented by counsel at the time. The lack of a meaningful opportunity to be heard on the motion to dismiss violated procedural due process.

However, due process errors in collateral proceedings are subject to harmless error analysis. The court analogized **People v. Stoecker**, 2020 IL 124807, a 2-1401 appeal involving the same type of error, in which the court found harmless error. The court distinguished **People v. Suarez**, 224 Ill. 2d 37 (2007), which found *per se* reversible error in a case involving post-conviction counsel's failure to comply with Rule 651(c). Because this case involved the same type of error as in **Stoecker**, harmless error analysis applied.

The error was harmless because the petition lacked merit. The petition claimed counsel was ineffective for failing to challenge the admissibility of testimony from two doctor witnesses, who examined and described the complainants' injuries. Defendant argued their expert testimony lacked foundation because they were not board-certified gynecologists. The supreme court found adequate support for their expertise in the record, noting they were board-certified in emergency medicine, had personal experience in the subject matter at issue, and were familiar with scientific literature on sexual assault.

People v. King, 2020 IL 123926 It was error to allow a State's witness to testify as an expert in crime scene analysis. The witness's testimony went far beyond the field of crime scene analysis where he offered opinions on the cause and manner of death, whether lividity was consistent with where the victim's body was found, whether injuries were inflicted before or after death, and whether leaves found at the scene were consistent with leaves from the victim's home. This testimony was especially problematic given that the State and defense presented competing experts as to cause of death, such that the crime scene analyst's testimony essentially broke the tie and given that laboratories at the University of Illinois and the Morton Arboretum had not been able to determine whether the leaves at the scene came from the victim's home. The remainder of the expert's testimony went to matters within the knowledge and understanding of the average juror and was therefore an improper subject for expert testimony.

The Court stated, "we wish to stress that we will not condone the calling of experts solely for the purpose of shoring up one party's theory of the case." The crime scene analysis testimony gave "expert" credence to the State's theory, and the evidence was not overwhelming where there were competing medical experts, no eyewitnesses, no confession, and no forensics connecting defendant to the offense. Accordingly, the improper expert testimony was not harmless error, and the matter was reversed and remanded for a new trial.

People v. Lerma, 2016 IL 118496 The rights to due process and a fair trial include the right to present witnesses in one's behalf. Generally, expert testimony is permitted if by virtue of experience and qualifications the witness possesses knowledge which is not common to lay persons and the testimony will aid the trier of fact in reaching a conclusion. In determining whether expert testimony is admissible, the trial court must balance the probative value of the evidence against its prejudicial effect. The trial court should also carefully consider the necessity and relevance of the expert testimony in light of the particular facts of the case.

The trial court is given broad discretion to decide whether to admit expert testimony, and its decision is reviewed for abuse of discretion. An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it.

In **People v. Enis**, 139 Ill. 2d 264, 564 N.E.2d 1135 (1990), the Illinois Supreme Court recognized developing authority in some jurisdictions that expert testimony concerning eyewitness identification should be admissible in certain circumstances, but suggested caution against the overuse of such testimony. Here, the court recognized that in the decades since **Enis** there has been a dramatic shift in the legal landscape such that the admission of expert testimony concerning the reliability of eyewitness testimony has become widely accepted. The court concluded, "[T]oday we are able to recognize that such research is well settled, well supported, and in appropriate cases a perfectly proper subject for expert testimony."

The court concluded that the trial court abused its discretion by denying defendant's motion to admit expert testimony concerning the reliability of eyewitness identification testimony. Defendant initially presented a pretrial motion *in limine* to allow a witness who was an attorney and a licensed psychologist to testify as an expert on the topic of memory and eyewitness identification. The trial court denied the motion, stressing that the eyewitnesses knew defendant prior to the shooting.

Defense counsel filed a motion to reconsider and indicated that the expert would testify that misidentifications have occurred where witnesses knew the person who was identified beforehand. The trial court denied the motion to reconsider, stating that the most "glaring" reason was that the witnesses claimed to have known defendant before the offense. The court also noted that according to an Ohio Court of Appeals opinion, some 12 years earlier the defense's expert witness testified that the factors which indicate that eyewitness identification testimony is unreliable apply where the eyewitness is viewing a stranger. The trial court acknowledged that the expert contested the accuracy of the Ohio court's description of his testimony in that case, but stated that where an Appellate Court justice made such a description, "I am not going any further down that road."

Defendant then filed a second motion to reconsider, tendering the report of a second expert who was a professor of psychology and a widely recognized expert in the field of human perception and memory. Before the second motion to reconsider was filed, the original expert had passed away. The new expert testified that although it would seem "intuitive to a jury" that a witness's identification would be more accurate if he or she is acquainted with the suspect, "this is not necessarily true."

The trial court again denied the motion to reconsider, stating that it was ruling for the same reasons it set forth in denying the admission of the original witness's testimony.

In finding an abuse of discretion, the Supreme Court stated that expert testimony on the reliability of eyewitness identification was both relevant and appropriate because the only evidence against defendant consisted of eyewitness identifications made by two witnesses, one of whom was deceased at the time of trial and whose identification was admitted as an excited utterance. In addition, most of the factors which both experts identified as potentially contributing to the unreliability of eyewitness testimony "are either present or possibly present in this case." These factors include the stress of the event itself, the use and/or presence of a weapon, the use of a partial disguise, exposure to post-event information, the fact that the event occurred at night, and the fact of cross-racial identification.

Furthermore, because one of the eyewitnesses had died, only one of the two eyewitnesses was subject to cross-examination. It was also unclear whether the witness who did testify actually knew the defendant before the identification, as she stated that she had seen him either 10 times or only once or twice, and in any event had only viewed him from across the street without ever speaking to him or being in the same room or house. When asked directly how long she had known the defendant before the shooting, she responded, "I did not know him." Under these circumstances, expert eyewitness testimony on the reliability of eyewitness identification would have been probative.

The court also concluded that the trial judge abused his discretion by denying admission of the second expert's testimony based on its rejection of the proposed testimony of the expert who died before trial. The original witness's proposed testimony was rejected because of the judge's "personal conviction" that mistaken identifications are unlikely where the witness and perpetrator knew each other before the offense.

The Supreme Court criticized the trial court's reasoning, noting that the first expert's report specifically addressed the issue of the likelihood of mistaken identifications where the

witness and suspect knew each other and rebutted the trial court's assumptions about what the expert would say. In addition, the reasons for excluding the first expert's testimony had nothing to do with the testimony of the second expert, whose report flatly contradicted the trial court's beliefs and whom the parties agreed was a qualified and highly respected expert. By relying on its personal beliefs concerning eyewitness identifications as the primary basis for denying the admission of the second witness's testimony, the trial court not only ignored the explicit contents of the report of the expert but substituted its own opinion on a matter of uncommon knowledge for that of a respected and qualified expert. The court also noted that the trial court's ruling was undercut by the conflict in the record concerning the extent to which the surviving eyewitness actually knew defendant before the offense.

Finally, the court rejected the trial court's belief that the first expert's testimony could be rejected based on a single sentence in an Ohio court opinion describing the expert's testimony in an earlier trial. Not only did the expert contest the accuracy of the Ohio court's summary of the evidence, but the testimony occurred some 13 years before the trial in this case. Rather than allow the witness to testify, however, the trial court chose to treat a one-sentence summary of the witness's testimony 13 years earlier "not only as indisputably accurate but also as a binding and authoritative representation" of the expert's opinion at the time of trial.

The erroneous exclusion of expert testimony concerning the reliability of the eyewitness identification was not harmless. The trial court's ruling prevented the jury from hearing relevant and probative expert testimony concerning the State's sole testifying eyewitness in a case in which there was no physical evidence connecting defendant to the crime, the remaining evidence of guilt was not overwhelming, and the excluded testimony was neither duplicative nor cumulative of other evidence.

Defendant's convictions for first degree murder and aggravated discharge of a weapon were reversed and the cause remanded for a new trial.

People v. Becker, 239 Ill.2d 215, 940 N.E.2d 11311 (2010) When determining the admissibility of expert testimony, a trial judge should balance the probative value of the testimony against its prejudicial effect. In the exercise of his or her discretion, the trial judge should carefully consider the necessity and relevance of the expert testimony in light of the facts of the case before admitting it for the jury's consideration. Expert testimony is only necessary when the subject is both particularly within the witness's experience and qualifications and beyond that of the average juror's, and when it will aid the jury in reaching its decision.

In a prosecution of defendant for predatory criminal sexual assault and criminal sexual assault of his three-year-old daughter, the defense sought to introduce the testimony of an expert who reviewed the out-of-court statements of the child and reached the conclusion that the techniques employed to interview the child adversely affected the accuracy of the child's statements. The expert did not interview the child herself because in her opinion "[t]here's no clean evidence left to get."

The Supreme Court found that the trial court did not abuse its discretion in excluding the testimony of the defense expert. One basis for exclusion of the expert testimony was that its admission would violate the rule that it is generally improper to ask one witness to comment on the credibility of another. The expert's testimony would constitute direct, adverse comment on the credibility of the child. Its practical effect would be to advise the jury to disregard not only the out-of-court statements of the child, but the child's in-court testimony as well.

A separate and independent basis for exclusion of the expert's testimony was that her testimony was not beyond the ken of the average juror. It is a matter of common understanding that children are subject to suggestion, that they often answer in a way that they believe will please adults, and that they are inclined to integrate fictional notions with reality. Defendant could, and did, apprise the jury of the circumstances surrounding the child's statements and these principles through examination of the witnesses and summation to the jury. Therefore, the expert's testimony had limited probative value and was unnecessary. This limited value was outweighed by the prejudice that the expert would have interjected into the trial by commenting directly and extensively on the credibility of the child witness and informing the jurors that her testimony should be disregarded.

People v. Lovejoy, 235 Ill.2d 97, 919 N.E.2d 843 (2009) The trial court did not abuse its discretion by accepting a forensic scientist as an expert in the field of fabric pattern impressions. Although the witness had participated in only two weeks of training in this area some ten years prior to trial and had not been qualified as an expert in this field before the instant trial, he had extensive experience comparing other, analogous types of impressions and possessed knowledge of the process by which impressions are left on objects. Furthermore, such knowledge was not common to the average layperson and was helpful to the jury.

Crawford was not violated where a medical examiner was allowed to testify concerning the results of toxicology testing done by an outside laboratory, where the examiner did not know the identity of the person who performed the testing or whether the equipment was in proper operating condition.

Under Illinois law, experts may both consider medical and psychological records commonly relied upon by members of their profession and testify about the contents of those records at trial. Because the medical examiner testified that it was common practice to rely on toxicological reports prepared by an outside laboratory when drawing conclusions related to the cause of death, and testified that he was trained to interpret such test results, those results were admissible. The court also noted that the statements were not admitted for the truth of the matter asserted – that the decedent had specified levels of substances in her blood – but to explain the expert's opinion concerning cause of death.

People v. McKown, 226 Ill.2d 245, 875 N.E.2d 1029 (2007) Horizontal gaze nystagmus (HGN) evidence is "scientific evidence," and therefore subject to the **Frye** standard. HGN, which measures the degree of involuntary jerking of the eyes, is not within the common knowledge of laymen and requires expert interpretation.

In addition, HGN testing is "novel" because courts nationwide have split concerning whether it is a reliable indicator of the use of alcohol.

The Supreme Court retained jurisdiction and remanded the cause for a **Frye** hearing. See also, **People v. Basler**, 193 Ill.2d 545, 740 N.E.2d 1 (2000) (the purpose of a **Frye** hearing is to determine whether novel scientific evidence is generally accepted in the relevant scientific community).

In re Commitment of Simons, 213 Ill.2d 523, 821 N.E.2d 1184 (2004) Under Illinois law, the admission of expert testimony is governed by Frye, which permits the admission of scientific evidence only if the methodology or scientific principle on which the evidence is based has gained general acceptance in the particular field to which it belongs. "General acceptance" does not mean universal acceptance or that the methodology is accepted

unanimously, but that the underlying method used to generate an expert opinion is reasonably relied upon by experts in the field.

In addition, **Frye** applies only to "new" or "novel" methodology. Methodology is considered "new" or "novel" if it is "original or striking" or does not resemble "something formerly known or used."

The trial court's decision concerning whether an expert witness is qualified to testify and will offer relevant testimony is reviewed for abuse of discretion. However, the trial court's determination whether the **Frye** standard has been satisfied is reviewed de novo. In reviewing a **Frye** ruling, a court of review may consider both the trial court record and "appropriate" sources from outside the record.

Donaldson v. CIPS, 199 Ill.2d 63, 767 N.E.2d 314 (2002) The court rejected the argument that Illinois law follows the "**Frye**-plus-reliability" test, which had been adopted by some appellate districts. Under that test, expert testimony is admissible only if the trial court determines both that the technique or methodology in question is generally accepted and that the specific opinion at issue is reliable. Under Illinois law, once a scientific technique is generally accepted, questions concerning the underlying data and the expert's opinion go to the weight of the evidence rather than to admissibility.

People v. Nieves, 193 Ill.2d 513, 739 N.E.2d 1277 (2000) Under Illinois law, an expert may give an opinion based on facts that are not in evidence, if those facts are of a type reasonably relied upon by experts in the particular field. In addition, an expert may disclose the findings and conclusions of nontestifying experts for the limited purpose of explaining the basis of the testifying expert's opinion, even though such evidence would be hearsay if offered for its truth.

No error occurred where a pathologist who had not performed the autopsy was allowed to give an opinion on cause of death. The pathologist who performed the autopsy was retired and out of the country at the time of trial, and the chief medical examiner examined the original pathologist's records before testifying that the death was the result of severe blows to the head and was consistent with being struck by a pipe. See also, **People v. Houser**, 305 Ill.App.3d 384, 712 N.E.2d 355 (4th Dist. 1999) (the trial court has discretion to determine whether evidence is the type reasonably relied upon by experts in the field; although the judge's determination shall not be disturbed absent an abuse of discretion, the court may not "abdicate its independent responsibilities" to determine whether "minimum standards of reliability" are satisfied; facts underlying an expert's opinion should be excluded where their probative value in explaining the expert opinion "pales beside" their prejudicial effect; information which is excluded by the law applicable to the case may not be entered under "guise" of being the basis of expert's opinion - purpose of the rule is to explore expert's opinion, not to admit evidence substantively).

People v. Novak, 163 Ill.2d 93, 643 N.E.2d 762 (1994) Former professional athletes who were athletic trainers at the time of the trial should have been allowed to testify as experts. An expert may testify if his experience and qualifications afford him knowledge not commonly held by lay persons, and if his testimony will aid the factfinder. An expert's specialized knowledge may be gained through practical experience or by formal study or training; qualification as an expert depends not on the manner in which specialized knowledge was obtained, but on the extent to which such knowledge is beyond that normally possessed by a nonexpert.

People v. Pasch, 152 Ill.2d 133, 604 N.E.2d 294 (1992) Defendant's right to confrontation was not violated when the State cross-examined a defense expert with the psychiatric reports of three experts who did not testify at trial, even though the cross-examination concerned the opinions of the nontestifying experts on defendant's sanity. Expert witnesses may consider psychological and medical records commonly relied upon by professionals in their field, and may testify to the contents of such records.

Although it would have been preferable for the trial judge to give specific instructions limiting the jury's consideration of the opinions of non-testifying experts, the failure to do so was not reversible error.

People v. Enis, 139 Ill.2d 264, 564 N.E.2d 1155 (1990) The trial judge did not err by precluding a defense expert witness from testifying about the reliability of eyewitness testimony. The Court discussed cases from other jurisdictions and set out the Illinois rule ("generally, an individual will be permitted to testify as an expert if his experience and qualifications afford him knowledge which is not common to lay persons and where such testimony will aid the trier of fact in reaching its conclusion"). The Court found that the expert testimony in this case, as shown by the offer of proof, "would not have aided the trier of fact in reaching its conclusion."

People v. Salazar, 126 Ill.2d 424, 535 N.E.2d 766 (1988) (rev'd other grounds, 162 Ill.2d 513, 643 N.E.2d 698 (1994)) The trial judge properly allowed a pathologist to testify regarding the sequence of gunshot wounds inflicted on the murder victim. The doctor's testimony was properly based on the amount of blood found in the chest cavity and was not impermissibly speculative. See also, **People v. Osborne**, 183 Ill.App.3d 5, 538 N.E.2d 822 (4th Dist. 1989) (pathologist was properly allowed to voice opinion that the victim died from suffocation).

People v. Anderson, 113 Ill.2d 1, 495 N.E.2d 485 (1986) In order to explain the basis of his opinion, an expert witness may reveal, on direct examination, the contents of material upon which he relied. Thus, a psychiatrist may testify about the contents of statements made by the defendant when such statements were relied upon in forming the diagnosis. The holding in **People v. Hester**, 39 Ill.2d 489, 237 N.E.2d 466 (1968) (that a nontreating physician could not base an opinion on statements made to him by the defendant) was rejected.

People v. Bryant, 113 Ill.2d 497, 499 N.E.2d 413 (1986) It was error to allow a forensic scientist to testify that glass pieces from the defendant's shoes and glass from a broken service station window had the same refractive index, and that there was "a good probability" that the glass came from the same source. "[T]he expert's testimony disclosed only that the pieces were consistent and therefore could have come from the same source'; "[t]here was no foundation presented for testimony regarding the frequency of the occurrence of this type of glass, much less a statement concerning the likelihood that the pieces had a common source."

People v. Wright, 111 Ill.2d 128, 490 N.E.2d 640 (1985) The trial court did not err by allowing a psychiatrist to render an opinion that defendant had been hospitalized for 15 years in mental institutions for a treatable personality disorder rather than a mental disease. Although the psychiatrist had not considered reports prepared during that 15-year-period or discussed the hospitalization with the treating psychiatrists, the psychiatrist's examination of defendant, as well as his review of other materials, provided a sufficient factual basis to

form an opinion. Furthermore, the credibility and weight to be given to the testimony was for the trier of fact to decide.

People v. Albanese, 102 Ill.2d 54, 464 N.E.2d 206 (1984) At a murder trial, an accountant was properly allowed to testify as an expert and to state the opinion that defendant was in "critical financial condition." It would have been unreasonable to expect the jury to examine the complex financial documents to determine defendant's financial condition. In addition, the defense offered its own expert, who testified that defendant was not in critical financial condition, and the jury was free to balance the testimony of the two experts. Finally, the opinion did not invade the province of the jury.

People v. Jordan, 103 Ill.2d 192, 469 N.E.2d 569 (1984) A witness will be permitted to testify as an expert "if his experience and qualifications afford him knowledge which is not common to lay persons and . . . such testimony will aid the trier of fact in reaching its conclusion. . . . Further, in rendering an opinion, the expert must rely upon scientific theories which have gained general acceptance in his field."

People v. Silagy, 101 Ill.2d 147, 461 N.E.2d 415 (1984) Where a psychiatrist testified that defendant was sexually dangerous, based in part on prior medical reports, it was proper to cross-examine him with another psychiatrist's prior diagnosis that defendant was not sexually dangerous.

People v. Free, 94 Ill.2d 378, 447 N.E.2d 218 (1983) A State's witness who was a psychologist and psychopharmacologist was qualified to give an opinion on the question of defendant's ability to act intentionally while under the influence of alcohol and PCP. The Court noted that the witness did not voice an opinion on defendant's sanity.

The Court also discussed whether a clinical psychologist may express an opinion as to a person's mental condition. Citing **People v. Noble**, 42 Ill.2d 425, 248 N.E.2d 96 (1969), the Court stated that the trend of recent decisions is to permit a properly qualified psychologist to testify as to the nature and results of psychological tests "even to the extent of permitting the expression of opinions as to the mental condition of the individual." The Court also noted that Illinois statutory law permits a clinical psychologist "to testify as an expert witness in the form of his opinion about the issue of fitness or insanity or mental illness."

Wilson v. Clark, 84 Ill.2d 186, 417 N.E.2d 1322 (1981) The Supreme Court adopted Federal Rules of Evidence 703 (Basis of Opinion Testimony by Experts) and 705 (Disclosure of Facts or Data Underlying Expert Opinion).

An expert may base an opinion on records (such as hospital records) which are the type reasonably replied by experts in the field, even if the records themselves are not in evidence. Thus, hypothetical questions need not be limited to facts in evidence, as was previously required under **People v. Yonder**, 44 Ill.2d 376, 256 N.E.2d 321 (1969). See also, **City of Chicago v. Anthony**, 136 Ill.2d 169, 554 N.E.2d 1381 (1990) (documents are not admitted for their truth, but solely to explain the basis of the expert's opinion; furthermore, the trial court must consider the reason for the substantive inadmissibility of the evidence and exclude evidence where the probative value is substantially outweighed by the danger of unfair prejudice, confusion, or misleading the jury).

Hernandez v. Power Construction Co., 73 Ill.2d 90, 382 N.E.2d 1201 (1978) When a subject matter is complicated and outside the scope of knowledge and understanding of the ordinary layperson, a witness who has expert knowledge on that subject is allowed to voice an opinion, in order to aid the trier of fact in understanding the matter and resolving factual questions.

People v. Park, 72 Ill.2d 203, 380 N.E.2d 795 (1978) The proponent of expert testimony has the burden of establishing the qualifications of an alleged expert. A police officer was not qualified to state an opinion that the substance seized was marijuana.

People v. Covey, 34 Ill.2d 195, 215 N.E.2d 220 (1966) An expert witness may voice an opinion as to an ultimate fact in issue when the matter is beyond the knowledge and understanding of the average person.

Darling v. Charleston Hospital, 33 Ill.2d 326, 211 N.E.2d 253 (1965) Standard or reputable texts may be used in cross-examining experts. See also, **People v. Behnke**, 41 Ill.App.3d 276, 353 N.E.2d 684 (5th Dist. 1976) (Federal Bureau of Narcotics manual "Basic Training Program for Forensic Drug Chemists" is not a "learned treatise" or of an "authoritative nature").

People v. Williams, 25 Ill.2d 562, 185 N.E.2d 686 (1962) A witness may only voice an opinion on subject matters for which he is qualified as an expert; he may not voice an opinion concerning matters for which he is not qualified or on matters that are within the knowledge and understanding of the trier of fact.

Illinois Appellate Court

People v. Dixon, 2022 IL App (1st) 200162 Defendant was convicted of murder based, in part, on the testimony of a blood spatter expert. In a post-conviction petition, defendant alleged ineffective assistance of appellate counsel for failing to challenge the foundation for this expert's testimony, because the expert did not conduct any measurements or calculations in forming his opinion as to the angle at which the blood made contact with defendant's pants and shoes.

According to Illinois Rule of Evidence 705, an "expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."

Here, the expert explained how blood stains are analyzed by detailing the types of observations he made as to the size, shape, location, distribution, numbers, and patterns of blood stains. He explained how and why certain shapes and patterns can indicate distance and force of injury. Any alleged deficiencies in foundation, such as a lack of measurements or calculations, were subjects for cross-examination, and went to the weight of the testimony rather than admissibility. Defense counsel thoroughly questioned the expert about the lack of measurements and calculations, and the expert stated his opinions as to the direction and angle of the spatter did not require calculations. At that point, the issue was one for the jury. In so finding, the appellate court declined to follow the "flawed analysis" of **People v. Safford**, 392 Ill. App. 3d 212 (2009).

People v. Quezada, 2022 IL App (2d) 200195 Multiple evidentiary errors at defendant's trial served to deny him a fair trial. While none of these errors, individually, was reversible, their cumulative effect was such that a new trial was required.

Specifically, it was error to admit the video interrogations of a witness. The witness testified for the State at trial and, while there were minor inconsistencies between his testimony and his prior statements to the police, the witness did not affirmatively damage the State's case, so the videos were not admissible for impeachment purposes. Similarly, the videos could not be admitted substantively under 725 ILCS 5/115-10.1 because they were not inconsistent with the witness's testimony. By showing the jury the entire interrogation, the State was able to improperly bolster the witness's testimony with prior consistent statements. This error was not preserved in the trial court, and it did not rise to the level of plain error under either the first or second prong.

It also was error to admit gang evidence at defendant's trial. The State's gang expert's testimony lacked adequate foundation; the expert did not testify that the factors he considered when assessing defendant's status as a gang member were of the sort reasonably relied upon by experts in the field. The fact that the witness had testified as a gang expert in prior cases did not necessarily mean that he relied on appropriate factors in this case. The Appellate Court agreed that the gang evidence was weak, and defense counsel should have moved to sever the charge of unlawful possession of a firearm by a street gang member from the charges of attempt murder of a police officer, aggravated discharge of a firearm, and possession of a defaced firearm. There was no evidence that those charges had a gang-related motive, and the gang evidence should not have been admitted with regard to those charges. (The court also reversed outright the unlawful possession of a firearm by a street gang member conviction on the basis that the State had failed to prove the gang member element beyond a reasonable doubt.)

Based on the cumulative effect of these two errors, the Appellate Court reversed defendant's convictions and remanded for a new trial.

People v. Price, 2021 Il App (4th) 190043 It was not error to allow EMT to testify that he observed "obvious" rigor mortis when he examined the victim's body at the scene where it was found. The EMT testified about his training and experience in the signs that a person is dead and explained that he was trained that rigor mortis is one of those signs. This provided an adequate foundation for the EMT to offer an expert opinion on rigor mortis.

And, while not presented as such in the trial court, the EMT's testimony could have been admitted as a lay opinion based on his personal observation under Illinois Rule of Evidence 701. The witness did not provide a technical definition of the term "rigor mortis," and a lay person understands that term to refer to the stiffness of a body that sets in after death. Further, other witnesses testified that the body was cold and stiff when it was found.

People v. Petrie, 2021 IL App (2d) 190213 Defendant was found guilty of aggravated battery to a child after a bench trial. The State alleged that defendant abused an infant in her care, leaving him with severe and lasting brain injuries. The Appellate Court held that counsel was ineffective for failing to challenge the State's expert's opinion that the infant suffered abusive head trauma (formerly shaken baby syndrome "SBS") while in defendant's care.

The infant had a seizure while at defendant's home day care. At the hospital, doctors found subdural hematomas, a skull fracture, retinal hemorrhages, and a healing rib fracture. The parties did not dispute the nature of the injuries, only the cause and timing. The State's primary witness, Dr. Davis, testified that the injuries (aside from the skull fracture, which

was two weeks or more old) were caused by SBS and, based on the level of swelling in the infant's brain, he must have suffered the injury immediately prior to the seizure. Davis based this opinion on the fact that victims of SBS do not experience a "lucid interval" after injury.

The doctor who operated on the infant believed the cause of the injuries to be trauma to the head that occurred hours rather than days before the seizure. Both doctors brushed aside defense questions about the lack of injury on the right side the infant's brain, the fact that his parents admitted he fell two days earlier and had vomited the night before, and the older fractures. The defense did not ask Dr. Davis why he believed no lucid interval would have occurred, and whether this opinion was supported by the literature or his own experience. The defense did call their own expert, a pediatrician who testified that, given the damage to only one side of the brain and the lack of neck injury, the infant had suffered a blow to the head, not SBS, up to 48 hours prior to the seizure.

The Appellate Court found counsel's cross-examination of Dr. Davis deficient. Although counsel ably put forth an alternative theory for the injuries – an earlier blow to the head – he failed to support the theory by exploiting weaknesses in Dr. Davis' opinions through cross-examination. First, counsel did not ask for the basis of Davis' belief that no lucid interval could have occurred. The doctor never testified that this was a consensus belief in the field or that it was supported by any literature or even his own experience. Thus, it was potentially inadmissible for lack of foundation.

Second, since SBS is a diagnosis of exclusion – made only after every other possible explanation is ruled out – counsel was ineffective for failing to ask Davis whether he first ruled out accidental causes, such as aspiration caused by vomit. The evidence did in fact show that the infant vomited the night before and immediately before the seizure, and was sleepy when dropped off at defendant's home. Defendant on appeal cited cases and a medical article discussing the possibility of brain swelling caused by this type of aspiration in conjunction with an earlier head trauma.

The Appellate Court agreed that by neglecting to broach these subjects, "counsel did not demonstrate the understanding of brain injuries in infants necessary to frame a cogent alternate explanation from those facts," either through cross-examination of Davis or through direct examination of his own witness. Where the trial court's guilty finding rested explicitly on Davis' opinion, and in particular the lack of a lucid interval, these shortcomings were prejudicial and a new trial was required.

People v. Pingleton, 2021 IL App (4th) 180751 Defendant filed a post-conviction petition claiming that he received ineffective assistance of counsel based on counsel's failure to object to expert opinion testimony by two doctors at his trial on charges of criminal sexual assault. The Appellate Court upheld the second-stage dismissal of that petition, noting that trial counsel's actions were a matter of trial strategy. And, even if it was not strategy, there is no merit to defendant's argument that counsel must object to experts who are not "certified" by the court prior to giving opinion testimony.

The Appellate Court discussed the typical procedure followed by courts when an expert witness is called to testify. Specifically, the attorney seeking to present expert testimony lays a foundation by asking the expert witness about his or her background, education, and experience and then offers the witness as an expert in a specified field. The opposing party then has the opportunity to question the witness and object to his or her qualifications. Finally, the court finds sufficient foundation for the expert testimony and accepts the witness as an expert. All of this happens in front of the jury. The Appellate Court suggested that this procedure should not be followed.

Instead, the Appellate Court said the court should never use the term "expert" in front of the jury. The parties can use the word "expert," but the trial court's use of the term runs the risk of giving additional weight to the expert's opinion without providing any additional probative value regarding the witness's qualifications. It should be left to the parties to argue during closing as to why certain evidence or witnesses should or should not be believed, without the court lending additional weight to "expert" testimony by approving it as such.

People v. Cross, 2021 IL App (1st) 190374 The trial court did not err in admitting the testimony of a fingerprint expert. The witness described scientifically accepted ACE-V methodology and testified that he followed that methodology in evaluating the latent fingerprint recovered in this case. Defendant argued, however, that the ACE-V has four steps, and the witness did not provide explicit testimony regarding his performance of the final verification step, in contrast to his detailed testimony on the analysis, comparison, and evaluation steps. But issues regarding an expert's application of generally accepted techniques go to the weight of the evidence, rather than its admissibility.

People v. Navarro, 2021 IL App (1st) 190483 Defendant's successive post-conviction petition alleged counsel was ineffective for failing to call an expert on eyewitness identification at his murder trial. The Appellate Court affirmed the dismissal, finding defendant failed to show cause as to why he could not have raised this claim on direct appeal.

Defendant argued that his direct appeal occurred prior to **People v. Lerma**, 2016 IL 118476, where the Supreme Court found the trial court abused its discretion in refusing to admit an expert on eyewitness testimony. Defendant alleged this "massive shift" in this area of the law, where the court recognized recent research that offered greater understanding of the weaknesses of eyewitness identifications, explained why he could not raise his claim earlier. The Appellate Court disagreed. The Illinois Supreme Court has long held that eyewitness identification is a proper area for expert testimony. **People v. Enis**, 139 Ill. 2d 264 (1990). Defendant did not need to wait for **Lerma** to support an ineffectiveness claim. And if **Lerma** *did* represent a massive shift in the law, defense counsel could not have been ineffective for failing to call an expert prior to that holding.

People v. Comier, 2020 IL App (1st) 170500 Trial court did not err in allowing testimony of arson investigator that the fire in this case was incendiary and caused by the use of an accelerant and open flame. While there was evidence the expert's methodology in reaching that conclusion was no longer "industry standard" by the time of defendant's trial, an expert's method need not be universally accepted so long as it is "reasonably relied upon by experts in the relevant field." The State's evidence met that standard here where the expert testified to his training and methodology and the facts and data upon which he relied in reaching his conclusion. Any weakness in the basis of an expert's opinion goes to the weight of the evidence, but not its admissibility.

People v. Himber, 2020 IL App (1st) 162182 It was not error to bar a defense expert from testifying that defendant suffered an alcohol-related blackout and did not recall shooting the victim. Voluntary intoxication is not a defense in Illinois, and the expert's opinion was not relevant to any fact at issue in the case.

People v. Tondini, 2019 IL App (3d) 170370 The Court did not err in refusing to allow defendant to present an "expert" witness on the subject of "violence dynamics." While an individual's proposed testimony does not have to be scientific in nature for the witness to

qualify as an expert, an expert cannot give general "profile" testimony related to common practices, habits, or characteristics which are not connected to defendant or the circumstances of the specific case at issue. Here, the proposed expert would have testified about "how violence works," but could not opine on whether defendant acted in self-defense because he had no firsthand knowledge of the altercation between defendant and the complaining witness. This would have been the equivalent of "profile" testimony and was properly excluded by the court.

People v. Frazier, 2019 IL App (1st) 172250 Defendant was charged with attempt first degree murder and aggravated discharge of a firearm arising out of an incident where defendant fired multiple shots at a vehicle. Defendant asserted a justification defense based on the fact that he was a military veteran suffering combat-related PTSD. The trial court did not err in granting the State's motion to limit expert testimony on the subject of defendant's PTSD, holding that the expert could testify about the diagnosis and how it affects behavior but could not testify that PTSD caused the defendant's actions here. An expert may not testify about a defendant's mental state at the time of an offense where the expert was not present to evaluate defendant at the time or shortly thereafter. Such testimony would usurp the trier of fact's role.

People v. Loggins, 2019 IL App (1st) 160482 At defendant's trial for PCS with intent to deliver, a police officer explained the significance of various purported tools of the trade found in defendant's apartment, including baggies, blenders, and cutting agents. The officer concluded that these items were suggestive of drug dealing. On appeal, defendant alleged this was improper expert testimony, and inadmissible because the State did not tender the officer as an expert.

The Appellate Court analyzed the distinction between lay and expert opinion, as delineated in Rules of Evidence 701 and 702. It concluded that an officer's lay opinion must be confined to matters of personal observation, and not include specialized knowledge or expertise. When the officer gives an opinion based on experience and training over the years, however, the testimony becomes an expert opinion. Here, the officer explicitly cited his experience when giving his opinion that the items in defendant's apartment are used for dealing drugs. Thus, the State should have tendered the officer as an expert before eliciting his opinion. Any error, however, was harmless where the qualifications the officer did testify to (five years as a narcotics investigator and annual training), clearly rendered him eligible to give an expert opinion, and where the evidence was sufficient even without his opinion.

People v. King, 2018 IL App (2d) 151112 The trial court erred when it allowed the State to call an expert in "crime scene analysis." The decedent, defendant's wife, was found on train tracks in running clothes. The parties' competing medical experts disagreed over whether she was strangled or died of natural causes. The State's crime scene analysis expert opined that she was likely killed by a close acquaintance in her home and transported to the staged scene, based on body positioning, location of lividity, absence of sports bra or earbuds, and vegetation found in decedent's home and on her body, among other things.

The Appellate Court held that testimony concerning cause of death exceeded the scope of the witness' expertise. Because the cause of death was contested and a lay person would not be able to discern the cause of death without a medical expert, it was improper for a crime scene expert to weigh in without the requisite medical expertise. Several aspects of his testimony also deviated from his specialty, including the effects of lividity, and the type of vegetation found on her body and in her home. Other testimony, including what a runner

would typically wear, were not proper subjects of expert testimony because they were based on logical conclusions that jurors could draw for themselves. Finally, in testifying that the offender must have been a close acquaintance, the expert improperly engaged in profiling and indirectly accused defendant. The errors were not harmless in a close case without eyewitnesses or a confession, and required a new trial.

The court also erred in overruling objections to testimony from the decedent's family concerning how upset they were by news of her death. Some references to a victim's family is inevitable, but dwelling on their grief is unduly prejudicial.

People v. Johnson, 2018 IL App (1st) 140725 The trial court did not abuse its discretion nor infringe on defendant's right to present a defense when it barred expert testimony from a doctor, and lay testimony from defendant's family, that would show that defendant was in a confused state following an epileptic seizure at the time of the shooting. The defense made clear that it was not raising an insanity defense, but rather wanted to show the absence of a voluntary act. The Appellate Court agreed with the State's argument that the testimony gave rise to a diminished capacity defense, which is not allowed in Illinois. Unlike other cases finding involuntary acts are not criminal, the testimony here could not establish whether the acts after a seizure are voluntary or involuntary. Thus, the testimony was irrelevant, would not aid the jury and would confuse the issues.

People v. Robinson, 2018 IL App (1st) 153319 The trial court did not abuse its discretion in overruling a foundational objection to the State's expert ballistics testimony. Rejecting defendant's reliance on **People v. Safford**, 392 Ill. App. 3d 212 (1st Dist. 2009), the Appellate Court held that a defendant alleging a foundational deficiency has the right and burden to elicit facts underlying an expert's opinion on cross-examination. Here, defendant objected the day of the expert's testimony and did not complain about a lack of discovery concerning the underlying facts. Counsel did not elicit any specific details about the expert's conclusions that certain cartridge casings matched certain guns. Any lack of detail about the basis for the expert's opinion goes to weight, not admissibility.

People v. Montano, 2017 IL App (2d) 140326 In **People v. Cruz**, 162 Ill. 2d 314, 643 N.E.2d 636 (1994), the Illinois Supreme Court held that bloodhound trailing evidence is inadmissible in Illinois criminal cases to show any factual proposition. However, in **People v. Lerma**, 2016 IL 118496 and **People v. Basler**, 193 Ill.2d 545, 740 N.E.2d 1 (2000), the Supreme Court held that "science is not static" and "methods must exist for reexamining the validity of scientific tests when new information is acquired."

After conducting a **Frye** hearing, the trial court found that human-remains-detector dog evidence is not analogous to bloodhound evidence. In addition, the lower court held that the fact that three human-remains-detection-dogs alerted to a rug which was found buried in an outdoor area of a horse farm was reliable and admissible even though no human remains were ever found.

After extensively discussing the law of Illinois and other jurisdictions and the evidence produced at the **Frye** hearing, the Appellate Court concluded that it need not decide whether alerts by human remains dogs are admissible because any error in this case would have been harmless in view of the overwhelming evidence of guilt.

People v. Thompson, 2017 IL App (3d) 160503 Where an element of the offense was that a certain pneumatic rifle had a muzzle velocity of at least 700 feet per second, an expert failed

to lay an adequate foundation for admission of his testimony that the muzzle velocity of 10 shots tested with a chronograph ranged from 714 to 741 feet per second. The expert testified that he had been using a chronograph for 20 years, that the chronograph was the industry standard for testing the velocity of ballistics, and that he had no formal training in measuring ballistic speed. To check the accuracy of his chronograph, the expert tested it against his friends' chronographs and against factory ammunition. He performed such verification within six months of the time he tested the rifle in this case.

The expert also testified that although chronographs can be calibrated, "[y]ou don't calibrate personal chronographs." He stated that he did not know when or if his friends' chronographs had been calibrated, he was unfamiliar with the standards for calibrating chronographs, he did not call the Illinois State Police for guidance because it does not offer velocity testing, he did not send the gun to the Illinois Crime Lab for testing because it could not calibrate a chronograph, and he did not consult any source to determine whether his chronograph was properly calibrated.

Under these circumstances, the expert failed to establish that the chronograph was working properly and that the results of his testing were accurate. In addition, the foundation was insufficient because the expert's reliance on the chronograph was based solely on his personal experience and not on any generally-accepted methodology.

In addition, the circumstances of the testing in this case were insufficient to justify a finding that the results were reliable. The expert testified that he did not place the gun in a fixed position or take into consideration the wind speed and direction or the level of humidity during the test. Furthermore, the expert was unfamiliar with the standards for recording wind resistence during testing with a chronograph.

Because the State failed to present a sufficient foundation for the muzzle speed testing, the trial court erred by admitting the expert's testimony. Defendant's convictions were reversed and the cause remanded for a new trial.

People v. Beck, 2017 IL App (4th) 160654 Over defendant's objection, the State was permitted to present expert testimony on retrograde extrapolation to provide evidence of defendant's blood alcohol level at the time of the accident. The court distinguished this case from **People v. Barnham**, 337 Ill. App. 3d 1121 (5th Dist. 2003), because the expert here had the qualifications and experience that were lacking in **Barnham** and understood the process of alcohol absorption and elimination.

As a matter of first impression in Illinois, retrograde extrapolation was found to be generally accepted in the relevant scientific community as a method of estimating blood alcohol content, thereby satisfying **Frye**. In reaching this conclusion, the court noted that the toxicologist testified that retrograde extrapolation was generally accepted in the field, it had been admitted in several cases previously, other jurisdictions admit and rely on it, and defendant did not direct the court to any case excluding it for lack of general acceptance.

Also, the court found adequate foundation for the retrograde extrapolation evidence offered here. Here, there had been a second blood draw approximately 5.5 hours after the first, and therefore there was an actual elimination rate established. Likewise, defendant's gender, height, and weight were known factors. While some assumptions had to be made in the retrograde extrapolation calculations, they were not so flawed as to be inadmissible.

People v. Burgund, 2016 IL App (5th) 130119 Defendant was convicted of predatory criminal sexual assault of his two children. The State's case consisted of his confession and the testimony of his estranged wife and mother-in-law. The trial court excluded several key

pieces of evidence defendant wanted to introduce to show that his confession was false and the testimony of his wife and mother-in-law was not believable.

First, the trial court excluded the testimony of a clinical psychologist who would have supported defendant's claim that he gave a false confession due to psychological pressure, manipulation, and suggestion by his wife and mother-in-law. The psychologist would have testified that defendant had the type of personality that made him highly suggestible and easily led, especially by his wife and mother-in-law.

A witness is permitted to testify as an expert if his experience and qualifications give him knowledge that lay people do not have and such testimony will aid the trier of fact. When the State presents evidence of a defendant's confession, the defendant has the right to present evidence that affects the weight a trier of fact will give to the confession.

The Appellate Court held that the psychologist should have been allowed to testify about his opinion that defendant had a personality that was subject to easy manipulation. An average juror would not readily understand why an innocent person might falsely believe he committed a crime. The expert's testimony would have thus aided the jury in evaluating the effect of the psychological environment that defendant claimed made him falsely confess. And it would have touched directly on the credibility of defendant's confession.

The court rejected the State's argument that the expert's testimony was properly excluded because he did not diagnose defendant as having any particular psychological or personality disorder. The jury was not required to find that defendant had a disorder before it could disbelieve his confession.

People v. Burhans, 2016 IL App (3d) 140462 To lay a foundation for expert testimony the proponent must show that the facts or data the expert relies upon are reasonably relied upon by experts in that particular field. Experts may rely upon information and opinions obtained from reading "standard publications" on which their opinion is based.

Here the State's expert testified that "numerous research studies" supported her opinion, but never identified these studies or testified that the general consensus of experts in the field recognized these studies. The court held that the State failed to lay an adequate foundation for these studies. While an expert does not need to name the publications on which she relies, the expert must show that the general consensus of the expert community recognizes the validity of the publications. Here the State did neither.

The court, however, affirmed defendant's convictions since the State's other evidence overwhelmingly supported his conviction and made any error harmless.

People v. Jones, 2015 IL App (1st) 121016 There was an insufficient evidentiary foundation to admit an expert's opinion that a bullet had been fired from defendant's weapon. The expert testified that he compared test bullets fired from defendant's handgun with the bullet obtained from the decedent's body and concluded that there was sufficient "agreement" to conclude that all of the bullets had been fired from the same weapon. However, the witness conceded that the State Police Crime Lab does not use any specific standard to determine when bullets markings match, but instead relies on an "overall pattern based on class and individual characteristics." The witness stated there is no "set number of how many lines" that are required for a match and that not all of the "striations . . . have to line up" in order for there to be a match.

Noting that the expert "gave no reason at all to support his expert opinion that there was sufficient agreement and a match between the bullet recovered by the victim and defendant's gun," the court held that the evidentiary foundation was insufficient. The court noted that the expert gave no testimony concerning any individual characteristics of either

the firearm or the bullet. In addition, where there is no evidence to explain how an expert reached an opinion, the defense is deprived of any meaningful opportunity to challenge the expert's findings on cross-examination.

The admission of the improper expert testimony was not harmless beyond a reasonable doubt where there were no eyewitnesses, defendant's statements to police were consistent with his innocence, and the expert testimony placed the murder weapon in defendant's hands. "Other than perhaps DNA evidence, we can think of no evidence more prejudicial than evidence literally placing the murder weapon in a defendant's hands."

Defendant's conviction for first degree murder was reversed and the cause remanded for a new trial.

People v. Starks, 2014 IL App (1st) 121169 The court noted that numerous studies have indicated that there is significant potential for error in eyewitness identifications and that jurors have misconceptions about the reliability of eyewitness testimony. In addition, whether trial courts should admit expert testimony on the reliability of eyewitness identification is a rapidly evolving area of the law.

Although the trial court has broad discretion in determining the admissibility of expert testimony, the record showed that the judge rejected the motion without considering the relevance of the evidence in light of the facts of this case. Because the conviction was being reversed on other grounds, the court directed the trial court to give serious consideration to defendant's request to present expert testimony on eyewitness identification.

Defendant's conviction was reversed and the cause remanded for a new trial.

People v. Cook, 2014 IL App (1st) 113079 Defendant argued that at his trial for involuntary manslaughter arising from the death of his four-month-old son, the trial court erroneously took judicial notice of the general acceptance of shaken baby syndrome (SBS) as a medical diagnosis because no **Frye** hearing has been held in Illinois to determine if an SBS diagnosis has gained general acceptance. The Appellate Court rejected this argument, holding that the State's expert testimony about SBS was not subject to the **Frye** standard because SBS it is a conclusion reached through observations and medical training and not a methodology.

The State's experts were physicians who testified that based on their observations, the injuries that caused death resulted from blunt trauma which exerted severe forces on the brain and were consistent with SBS. These opinions were based on an application of medical training to their observations. Defendant did not challenge the medical methodology relied upon to reach the experts' conclusions; instead defendant challenged the conclusions themselves.

Because the expert testimony was based on the witnesses' medical knowledge and experience and not on a theory of SBS or any other novel scientific theory, no **Frye** hearing was required.

People v. Atherton, 406 Ill.App.3d 598, 940 N.E.2d 775 (2d Dist. 2010) In a prosecution for predatory criminal sexual assault, a child welfare supervisor who worked for a private social services agency testified to the characteristics of child-sexual-abuse-accommodation syndrome that are often observed in children who have been sexually abused. The Appellate Court addressed three issues related to the admissibility of that evidence.

A **Frye** hearing on the admissibility of evidence of child-sexual-abuse-accommodation syndrome was not necessary. In **People v. Nelson**, 203 Ill.App.3d 1038, 561 N.E.2d 439 (5th Dist. 1990), the court considered numerous scholarly articles on the syndrome and concluded

that it was generally accepted in the psychological community that children who have been sexually abused behave differently than those who have not been abused. As this is exactly the underlying basis of the syndrome, the **Nelson** decision supported the determination that evidence pertaining to the syndrome was generally accepted.

The adequacy of the qualifications of an expert witness is a matter within the sound discretion of the trial court. Expertise is not measured by a given level of academic qualification, but by whether the proposed expert has knowledge and experience beyond that of the average citizen that would assist the jury in evaluating the evidence. It does not matter whether the expert acquired specialized knowledge through education, training, experience, or a combination of each.

The trial court did not abuse its discretion in allowing a child welfare supervisor to testify as an expert regarding child-sexual-abuse-accommodation syndrome, even though she was not a psychologist or expert in the field of psychology. The witness worked with staff members who worked with sexually-abused children. She had a bachelor's degree in law enforcement, a master's degree in human and family resources, and was studying for a doctorate in education. She had worked with victims and offenders as a sexual abuse therapist, and dealt with emotionally disturbed, neglected, and abused adolescents as a child care worker. She was familiar with child-sexual-abuse-accommodation syndrome through reading articles on the subject and her work with children.

Evidence is admissible when it is relevant to an issue in dispute and its probative value is not substantially outweighed by its prejudicial effect. Evidence is considered relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of an action more or less probable than it would be without the evidence.

Testimony regarding child-sexual-abuse-accommodation syndrome was relevant. Few jurors have sufficient familiarity with child sexual abuse to understand the dynamics of a sexually-abusive relationship. The defense attacked the credibility of the child witness by introducing evidence of her delayed reporting and inconsistencies in her testimony. The syndrome evidence aided the trier of fact in weighing that evidence.

People v. Johnson, 394 Ill.App.3d 1027, 915 N.E.2d 845 (1st Dist. 2009) The court rejected the argument that the State failed to establish a proper foundation for admission of the DNA profile where there was no evidence that the equipment used to prepare the profile was adequately calibrated and functioning properly. Under **Wilson v. Clark**, 84 Ill.2d 186, 417 N.E.2d 1322 (1981), an expert is allowed to give his opinion based on matters that are not in evidence, if such matters are reasonably relied upon the experts in the particular field. Where expert testimony is based on an electronic or mechanical device, however, the expert must provide some foundational proof that the device was functioning properly at the time it was used.

Because the expert testified that she had worked as laboratory director at the facility which performed the DNA analysis, described extensively the laboratory's accreditations and the review required to obtain such accreditations, and stated that the file indicated specific notations which showed that proper procedures for DNA analysis had been followed, her testimony provided a sufficient foundation of the procedures and specifications on which her expert opinion could reasonably be based.

People v. Howard, 305 Ill.App.3d 300, 712 N.E.2d 380 (2d Dist. 1999) It was improper to admit evidence of the Battered Woman Syndrome where the testimony concerned someone other than the defendant and covered actions occurring up to four years after the offense. In addition, by testifying that there was no evidence the girlfriend was attempting to deceive,

the expert intruded on the province of the jury to determine credibility and assess the facts of the case. "[T]rial courts should reject the State's attempts to use expert testimony to bolster the credibility of witnesses, as these are matters best left to the trier of fact."

The court distinguished this case from precedent in which syndrome evidence was admitted only on rebuttal (after the victim's credibility had been attacked), to explain the behavior of a victim (rather than that of a mere witness), or to establish a defendant's state of mind when she murdered her spouse.

People v. Shelton, 303 Ill.App.3d 915, 708 N.E.2d 815 (5th Dist. 1999) Under **People v. Jacquith**, 129 Ill.App.3d 107, 472 N.E.2d 107 (1st Dist. 1984), a police officer with training in the detection of drug use and experience with drug users may be qualified to testify as an expert concerning his or her belief that a person is under the influence of drugs. Here, however, the arresting officer had only limited training in detecting drug use and repeatedly used the pronoun "we" when discussing his experiences, suggesting that at least part of his knowledge was based on the experience of others. Under these circumstances, the State failed to establish that the officer had sufficient experience with drug users to admit his opinion that defendant was under the influence of drugs.

People v. Mathews, 299 Ill.App.3d 914, 702 N.E.2d 291 (1st Dist. 1998) Evidence of gang membership and activity is admissible where relevant to an issue in dispute, provided that the probative value is not substantially outweighed by the prejudicial effect. Where a police officer is called to testify concerning gang activity, the officer must qualify as an expert before the testimony can be admitted.

Where only limited testimony concerning the witness's "expertise" on gang crime was elicited (the officer was asked only if he was familiar with what gangs were located in the area of the shooting) "a more detailed foundation" was required. See also, **People v. Jackson**, 145 Ill.App.3d 626, 495 N.E.2d 1207 (1st Dist. 1986) (police officer with five years' experience in street gang investigations was qualified to give an expert opinion of defendant's gang membership).

People v. Lowitzki, 285 Ill.App.3d 770, 674 N.E.2d 859 (1st Dist. 1996) A defense witness who was a professor of criminal justice with a Ph.D in psychology, but who was not a psychiatrist, medical doctor psychologist or social worker, was incompetent to testify as an expert concerning defendant's state of mind at the time of the offense. In Illinois, only a psychiatrist or licensed clinical psychologist may testify as an expert regarding insanity or mental illness (730 ILCS 5/5-2-5).

Similarly, under §5-2-5 a "clinical psychotherapist" was not competent to testify as an expert.

People v. Jakupcak, 275 Ill.App.3d 830, 656 N.E.2d 442 (3d Dist. 1995) In most cases, conflicting testimony by experts merely raises a factual question to be decided by the trier of fact. Where the State's expert failed to rely on generally accepted scientific theories, however, there was an insufficient foundation for admission of the expert's opinion.

Northwestern University's traffic accident reconstruction manual could be considered on appeal though it had not been introduced at trial. Scholarly works to which the parties and witnesses referred at trial are properly considered on appeal, even if they were not actually introduced. Here, the defense expert testified that he had written one of the chapters in the manual, and the State's expert conceded that the manual was an authoritative treatise.

People v. Chambers, 259 Ill.App.3d 631, 631 N.E.2d 817 (2d Dist. 1994) As a matter of plain error, the trial judge erred by admitting a psychiatrist's extensive testimony about defendant's criminal history. Although an expert testifying on the issue of sanity may explain the basis of his opinion by disclosing materials on which he relied, the detailed recital of defendant's criminal past given here had at best only marginal relevancy to the issue of sanity. The trial court's ruling "essentially allowed [the State expert] to offer generally inadmissible evidence, containing a high degree of unfair prejudice, to shore up a conclusion that was not disputed." See also, **People v. Solis**, 275 Ill.App.3d 346, 655 N.E.2d 954 (1st Dist. 1995) (the trial judge erred by allowing the State's expert to disclose inadmissible evidence to explain the basis of his opinion; though expert opinions may be based on inadmissible evidence, that evidence may not be disclosed if its probative value is substantially less than its prejudicial effect).

People v. Sifuentes, 248 Ill.App.3d 248, 618 N.E.2d 643 (1st Dist. 1993) Although an expert's opinion may be based on inadmissible information of the sort typically relied upon by experts in the field, the trial court must insure that what is presented as expert opinion is not merely a means of placing otherwise inadmissible matters into evidence. At an arson trial, an expert's testimony should have been excluded where it was based in large part on defendant's inadmissible confession.

People v. Wilson, 246 Ill.App.3d 311, 615 N.E.2d 1283 (4th Dist. 1993) At a jury trial for aggravated criminal sexual assault and aggravated criminal sexual abuse, expert testimony concerning the difficulty with which children remember and describe incidents of sexual abuse was properly excluded. "The limited cognitive abilities of children are well known, and any jury can be expected to take that factor into account when determining a child's credibility." Thus, the testimony would have provided no useful information to the jury.

The Court added that the expert testimony would have provided only "stereotyped generalizations" which were "of dubious authenticity." See also, **People v. Simpkins**, 297 Ill.App.3d 668, 697 N.E.2d 302 (4th Dist. 1998) (although 725 ILCS 5/115-7.2 authorizes expert testimony relating to any recognized form of post-traumatic stress syndrome, such testimony should be excluded when it would afford the jury no information beyond that already possessed by the average layperson and would severely impinge on the province of the jury to determine credibility and factual issues; expert testimony concerning the frequency with which children recant allegations of sexual abuse, and the reasons for such recantations, should have been excluded where it did not aid the jury but did impinge on its province to determine facts and credibility. Compare, **People v. Cardamone**, 381 Ill.App.3d 462, 885 N.E.2d 1159 (2d Dist. 2008) (trial court erred by excluding expert testimony that the complainants' claims were unreliable due to the circumstances surrounding their statements and the interviewing techniques used by authorities; although an expert may normally not give an opinion concerning the credibility of witnesses, the experts were discussing factors affecting the ability of children to remember alleged sexual abuse and applying those factors to this case; such evidence was not common to lay jurors, dealt specifically with this case, and "was relevant to whether the investigative techniques and . . . circumstances . . . created distorted memories or misconceptions").

People v. Pollard, 225 Ill.App.3d 970, 589 N.E.2d 175 (3d Dist. 1992) An expert witness was properly allowed to testify that a 10-year-old sexual assault complainant suffered from Child Sexual Abuse Accommodation Syndrome. **People v. Nelson**, 203 Ill.App.3d 1038, 561

N.E.2d 439 (5th Dist. 1990) and **People v. Wasson**, 211 Ill.App.3d 264, 569 N.E.2d 132 (4th Dist. 1991) recognize C.S.A.A.S. as an accepted form of post-traumatic stress syndrome, the witness who testified was qualified as an expert, and a sufficient foundation was established.

People v. Moody, 199 Ill.App.3d 455, 557 N.E.2d 335 (1st Dist. 1990) It was error to allow an evidence technician with the Chicago police department to testify concerning the maximum time after the discharge of a gun that a gunshot residue test could be expected to prove positive. There was no showing that the technician was qualified to give such an opinion, and his sole expertise was in administering the test by wiping defendant's hands with chemically treated cotton swabs, sealing the swabs, and delivering them to the lab.

People v. Harp, 193 Ill.App.3d 838, 550 N.E.2d 1163 (4th Dist. 1990) Pursuant to what is now 725 ILCS 5/115-7.2, a witness who is qualified as an expert may testify regarding rape-trauma syndrome and may offer an opinion on the ultimate issue that the sex offense complainant exhibited symptoms consistent with that syndrome. Allowing such testimony for the first time in rebuttal is within the discretion of the trial judge. (Section 115-7.2 provides that in prosecutions for certain offenses, "testimony by an expert, qualified by the court relating to any recognized and accepted form of post-traumatic stress syndrome shall be admissible as evidence.")

People v. Perry, 147 Ill.App.3d 272, 498 N.E.2d 1167 (1st Dist. 1986) In a murder case, it was error for a pathologist to voice his opinion that the death was not accidental. Where a jury is competent to determine the facts in issue, an expert opinion is of no special assistance and should not be admitted.

People v. Johnson, 123 Ill.App.3d 1008, 463 N.E.2d 877 (4th Dist. 1984) An expert witness was properly allowed to testify that a piece of rubber found in defendant's car matched a rubber glove found near certain guns. The expert explained the comparison by reference to enlarged photos, a comparison the jury would not have been able to draw without the expert's testimony.

People v. Minnis, 118 Ill.App.3d 345, 455 N.E.2d 209 (4th Dist. 1983) The defendant, on trial for the murder of her husband, should have been allowed to present expert testimony on the "battered woman syndrome." See also, **People v. Jackson**, 180 Ill.App.3d 78, 535 N.E.2d 1086 (3d Dist. 1989) (courts which have permitted expert testimony on the battered woman syndrome "have generally done so only in cases involving self-defense and only for the purpose of explaining why the abuse a woman has suffered causes her to reasonably believe that her life is in danger and that she must use deadly force to escape her batterer"; expert's testimony about the battered woman syndrome was irrelevant where defendant did not claim self-defense, but that she was not involved).

People v. Einstein, 106 Ill.App.3d 526, 435 N.E.2d 1257 (1st Dist. 1982) A non-practicing pharmacist was properly found to be an expert in pharmacy, based on his education and experience.

People v. Groth, 105 Ill.App.3d 244, 434 N.E.2d 65 (4th Dist. 1982) A crime scene technician was improperly allowed to voice an opinion as to the number of people present in the room at the time of decedent's death; the foundation for his expertise was insufficient.

People v. Collins, 71 Ill.App.3d 815, 390 N.E.2d 463 (1st Dist. 1979) A State expert witness (a pathologist) was properly allowed to give an opinion that a certain gun, or one absolutely like it, caused the injury in question. The opinion was based on the witness's personal and detailed examination of the wound and the gun.

People v. Beil, 76 Ill.App.3d 924, 395 N.E.2d 400 (4th Dist. 1979) Defendant was qualified to testify as an expert on radar where he had attended numerous courses on radar, had operated it while in the Navy, and had followed recent developments through literature in the field.

People v. DeJesus, 71 Ill.App.3d 235, 389 N.E.2d 260 (2d Dist. 1979) A physician was properly allowed to testify that he diagnosed a child's injuries as "the battered child syndrome."

People v. Godbout, 42 Ill.App.3d 1001, 356 N.E.2d 865 (1st Dist. 1976) The trial judge erred by taking judicial notice of an expert witness's expertise and thus preventing defendant from qualifying the expert before the jury. All matters bearing on an expert witness's qualifications may be brought out when presenting such a witness - a party offering an expert witness should be allowed to make plain the strength of the witness's grounds of knowledge and the reasons for trusting his belief.

People v. Rice, 40 Ill.App.3d 667, 352 N.E.2d 452 (3d Dist. 1976) Expert testimony concerning the manner in which alcohol affects human memory and judgment should have been admitted in support of defendant's testimony that he had been drinking and remembered little of the incident in question. Such testimony was relevant to help the jury in its evaluation of the possibility that defendant suffered memory loss, and the jury may have had considerable doubt as to defendant's credibility without having some expert testimony on this issue.

People v. Perry, 19 Ill.App.3d 254, 311 N.E.2d 341 (1st Dist. 1974) Policeman was not qualified to voice opinion concerning the amount of trigger pressure necessary to discharge gun.

People v. Cunningham, 73 Ill.App.2d 357, 218 N.E.2d 827 (3d Dist. 1966) The trial judge may permit a psychiatrist to be present and observe the defendant while he testifies, and then use the observations as a basis for an opinion regarding the defendant's sanity. However, it is improper to permit a psychiatrist to observe other witnesses and thereafter refer to and characterize their testimony.

§19-24
Other Crimes Evidence

§19-24(a)
General Rules

United States Supreme Court
Huddleston v. U.S., 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988) Under Federal Rule of Evidence 404(b), the prosecution is not required to prove defendant's commission of

a prior crime by a preponderance of the evidence. Such evidence is relevant and admissible, however, "only if the jury can reasonably conclude that the act occurred and that the defendant was the actor."

Illinois Supreme Court

People v. Pikes, 2013 IL 115171 The rule that evidence of the commission of other crimes by the accused is inadmissible for the purpose of showing a propensity to commit crimes is an aspect of the rule that the prosecution may not introduce evidence of a character trait of the accused. The concern is not that such evidence is lacking in probative value, but that it may over persuade the jury, which might convict the accused because it believes he is a bad person.

The concerns underlying the admission of other-crime evidence are not present when the uncharged crime was not committed by the defendant. There is no danger that the jury will convict the defendant because it believes he has a propensity to commit crimes. The admissibility of such evidence is analyzed under ordinary principles of relevance, not according to rules governing the admission of other-crime evidence.

Defendant was charged with a murder that allegedly arose out of a conflict between two gangs. The feud began with the shooting of a member of defendant's gang. Then on the day prior to the murder, a rival gang member rode a scooter into the territory of defendant's gang. When Donegan, a member of defendant's gang, shot at the person on the scooter, he was struck by a car containing other rival gang members that was following the scooter. Donegan then recruited defendant to assist him in exacting revenge by committing a drive-by shooting, which led to the murder for which defendant was convicted.

The Appellate Court reversed the conviction, finding that evidence of the scooter shooting was improperly admitted as other-crime evidence where there was no evidence connecting defendant to that incident.

The Illinois Supreme Court reversed the Appellate Court. Because it is undisputed that defendant was not involved in the scooter shooting, the scooter shooting is not evidence of another crime for purposes of evaluating its admissibility. The scooter incident was relevant to show defendant's motive for the subsequent murder. The fact that defendant may have had a secondary motive, the rival gang's shooting of defendant's fellow gang member, did not mean that he was not also motivated to retaliate for the scooter incident.

The defendant was not prejudiced by a jury instruction that directed the jury to determine whether defendant was involved in conduct other than that charged in the indictment. There was evidence at trial that at the time of the murder defendant and Donegan drove a car stolen by use of a "jiggler" key. Since the evidence at trial clearly showed that defendant was not involved in the scooter shooting, the instruction must have referred to the stolen car.

People v. Ward, 2011 IL 108690 At defendant's trial, the circuit court admitted evidence of defendant's commission of a separate sex offense as propensity evidence pursuant to §115-7.3, but barred the admission of evidence that defendant had been acquitted of that offense. Applying the balancing test of §115-7.3(c), the Illinois Supreme Court concluded that it was error to bar the acquittal evidence.

The probative value of the acquittal evidence was its ability to provide a more complete context for the testimony of the other-crime complainant. The similarities between the two crimes greatly enhanced the probative value of the other-crime evidence. Excluding evidence that defendant had been acquitted of the other crime limited the jury's ability to assess the testimony of the other-crime complainant and may have enhanced her credibility

because the jury did not hear all of the evidence leading to defendant's prior acquittal that could have affected the jurors' consideration of her credibility. The complete absence of any reference to the outcome in that case severely restricted defendant's ability to provide context for her allegations. The highly inflammatory nature of those allegations and the grave danger of excessive sympathy for the alleged victim added to defendant's need to counter the impact of that evidence with the acquittal evidence.

There was also a readily-apparent potential for unfair prejudice to the defendant from the other-crime complainant's detailed testimony, followed by her statement that she had previously testified in another case. Given the graphic nature of her depiction of the attack, the jury would naturally assume that the State had pressed charges against the defendant, and the jury would be left to speculate whether those charges were ongoing or had been resolved. Evidence that defendant had been acquitted of that assault would put to rest that speculation.

The jury would likely react to the testimony of the other-crime complainant with sympathy for her and hatred for the defendant. That evidence also seriously undercut defendant's consent defense. Due to the overly-persuasive probative value of propensity evidence, the need to avoid unfair prejudice by providing a full context for that evidence is evident. Fairness therefore required disclosure of the acquittal.

People v. Dabbs, 239 Ill.2d 277, 940 N.E.2d 1088 (2010) 725 ILCS 5/115-7.4 abrogates the common law rule and authorizes a trial court, in its discretion, to admit other crimes evidence in domestic violence prosecutions even on the issue of propensity to commit domestic violence offenses.

The court rejected the argument that under §115-7.4, such evidence must be admitted without regard to its relevance or prejudice. Because §115-7.4 abrogates a common law rule of evidence, it is to be interpreted most narrowly in favor of those against whom it is directed. The court concluded that §115-7.4 retains the common law requirement that such evidence is admissible only if it is relevant and only if the probative value is not substantially outweighed by the risk of undue prejudice.

The court rejected the argument that §115-7.4 violates due process. In the course of its holding, the court noted that the exclusion of other crimes evidence to show propensity is based on a common law rule, and not a rule of constitutional magnitude. §115-7.4 serves the legitimate State interest of permitting the prosecution of recidivist domestic violence offenders. The court found that domestic violence frequently involves victims who are vulnerable and reluctant to testify, and that a domestic abuser is frequently "adept at presenting himself as a calm and reasonable person and his victim as hysterical or mentally ill." Because the admission of evidence of prior, similar offenses might persuade a trier of fact that the present victim is worthy of belief because her experience is corroborated, §115-7.4 is rationally related to the interest of allowing the effective prosecution of domestic abuse.

People v. Donoho, 204 Ill.2d 159, 788 N.E.2d 707 (2003) By enacting 725 ILCS 5/115-7.3, which provides that where a defendant is charged with specified crimes (including criminal sexual assault and aggravated criminal sexual abuse), evidence that defendant committed another such offense "may be admissible (if that evidence is otherwise admissible under the rules of evidence) and may be considered for its bearing on any matter to which it is relevant," the legislature intended to authorize admission of other crimes evidence to establish defendant's propensity to commit sexual offenses.

People v. Hall, 194 Ill.2d 305, 743 N.E.2d 521 (2000) The trial judge erred by allowing the State to show that a defendant charged with murder physically abused his wife after the offense, because such evidence improperly informed the jury that defendant had committed unrelated crimes. However, the plain error rule was inapplicable because the evidence of guilt was not closely balanced and a fair trial was not denied.

People v. Nieves, 193 Ill.2d 513, 739 N.E.2d 1277 (2000) The trial judge erred by permitting the prosecutor to read into the record portions of a pretrial statement indicating that when defendant surrendered to New York law enforcement authorities, he discussed crimes that had occurred in both Chicago and New York. Defendant's New York crimes were not relevant to explain the manner in which he was placed in custody by Chicago police.

Other crimes evidence may be admissible to show "steps in the investigation of the crime and events leading to it," but only if the evidence specifically connects defendant with the crimes for which he is being tried. Defendant's criminal activities in New York had no relevance to whether he committed a murder in Illinois. In view of the other evidence of guilt, however, the error was harmless beyond a reasonable doubt.

Also, the trial court did not improperly admit other crimes evidence by allowing testimony that the decedent's body was found with his pants pockets turned inside out. Defendant argued that such evidence showed a robbery, an offense with which he was not charged. Evidence concerning the condition of the decedent's clothing was admissible to show the nature of the murder with which defendant was charged. Such evidence did not show an uncharged crime; instead, it showed "part of the very same crime at issue before the court."

People v. Placek, 184 Ill.2d 370, 704 N.E.2d 393 (1998) Although other crimes evidence is admissible if relevant to establish a material question other than defendant's mere propensity to commit a crime, before admitting such evidence the trial court must determine that its prejudicial effect does not substantially outweigh its probative value. The decision to admit other crimes evidence will be overturned only if there is a clear abuse of discretion.

To be admissible to disprove an entrapment defense, other crimes evidence must involve offenses that are "specifically relevant to the defendant's claim of entrapment." Specific relevance may be demonstrated by showing that the other crime is similar to the crime with which defendant is charged or is "proximate in time" to the charged offense.

The trial judge abused his discretion by admitting evidence that defendant dealt in stolen auto parts, because auto theft crimes were not specifically relevant to the drug offenses at issue. Theft of auto parts is not sufficiently similar to the delivery of controlled substances to supply the necessary relevance.

A jury instruction limiting consideration of the evidence to defendant's "design and predisposition" did not cure the error. Because the instruction allowed the jury to consider the evidence for predisposition, on which it was inadmissible, it "was . . . erroneous under the facts of this case, and certainly did nothing to cure the improper admission of the other-crimes evidence."

People v. Robinson, 167 Ill.2d 53, 656 N.E.2d 1090 (1995) Evidence of other crimes is generally inadmissible because it tends to "overpersuade" the jury that defendant is a bad person deserving punishment. However, such evidence is admissible where it is relevant for some purpose other than to show defendant's propensity to commit crimes. Before admitting such evidence, the trial court must weigh its prejudicial effect against its probative value; the evidence must be excluded if the former substantially outweighs the latter.

By allowing the State to choose which two of several crimes it wished to admit, the trial court did not fail to independently weigh the probative value and prejudicial effect. Although the trial judge allowed the State to select which two crimes to present, he reserved the right to review those crimes to determine whether they were admissible. Further, any offense that occurred 13 years earlier was not too remote to be admitted where defendant had been incarcerated for all but two of the years between the crimes.

Finally, defendant waived any argument that the trial court improperly allowed the State to introduce details of the other crimes, because defense counsel failed to object to the extraneous testimony. The plain error doctrine did not apply because the State presented "persuasive identification testimony."

People v. Thingvold, 145 Ill.2d 441, 584 N.E.2d 89 (1991) Defendant was convicted of solicitation for asking a man named Nalan to kill defendant's second wife. To show intent and motive, the State was allowed to introduce the testimony of three other men regarding defendant's solicitations to commit the same or similar crimes.

It was improper to admit testimony of a witness who claimed that the solicitation had occurred more than 10 years before this offense and concerned defendant's first wife. Such testimony was not relevant to intent or motive regarding defendant's second wife, but merely established a propensity to commit crime.

However, the trial court properly admitted evidence that defendant had more recently solicited two other men to kill his second wife so that defendant could collect insurance money, because such evidence tended to show intent and motive.

Finally, the State should not have been allowed to introduce evidence that on a previous occasion the second wife had been subjected to a violent attack, because defendant was never shown to have been involved in the incident. For the same reason, the State should not have been allowed to show that the second wife in fact died as the result of a violent attack.

People v. Phillips, 127 Ill.2d 499, 538 N.E.2d 500 (1989) To introduce other crimes evidence, the State must make a threshold showing that a prior crime occurred and that defendant participated in it. Such proof need not be made beyond a reasonable doubt.

People v. Richardson, 123 Ill.2d 322, 528 N.E.2d 612 (1988) Defendant, for the first time on appeal, contended that the jury should have been specifically instructed to compare the characteristics of the offense on trial with the other offense allegedly committed by defendant and to determine whether they were sufficiently similar to permit a reciprocal inference of identify. Because the jury was given IPI 1.02 and IPI 3.14, "the jury was properly instructed regarding the other-crimes evidence [and] there most certainly was not a substantial defect by which defendant was denied due process."

People v. King, 109 Ill.2d 514, 488 N.E.2d 949 (1986) Evidence of another crime was properly admitted because it was relevant to establish the accuracy of defendant's confession and to rebut defendant's contention that the confession had been coerced.

People v. Jones, 105 Ill.2d 342, 475 N.E.2d 832 (1985) Defendant's possession of items taken during the prior burglary, and the testimony of witnesses denying that they sold the items to defendant, as defendant claimed, was sufficient to show that defendant participated in the prior burglary.

People v. Stewart, 105 Ill.2d 22, 473 N.E.2d 840 (1984) The list of proper uses for other crime evidence set out in prior decisions (such as modus operandi, intent, identity, motive or absence of mistake) "should not be considered as exclusive" or "taken to mean that these are the only purposes for which testimony of other crimes may be admitted." Instead, evidence of other crimes "is admissible if it is relevant to establish any fact material to the prosecution." See also, **People v. Kimbrough**, 138 Ill.App.3d 481, 485 N.E.2d 1292 (1st Dist. 1985) (examples of various purposes for which other crimes evidence may be used).

When evidence of other crimes is offered, "it is incumbent upon the trial judge to weigh the relevance of the evidence to establish the purpose for which it is offered against the prejudicial effect the introduction of such evidence may have upon the defendant." See also, **People v. Copeland**, 66 Ill.App.3d 556, 384 N.E.2d 391 (1st Dist. 1978) (judge must balance relevance against the tendency to inflame and prejudice the jury).

People v. Bartell, 98 Ill.2d 294, 456 N.E.2d 59 (1983) Evidence of subsequent, as well as prior, offenses may be used to show intent or *modus operandi*. See also, **People v. Kimbrough**, 138 Ill.App.3d 481, 485 N.E.2d 1292 (1st Dist. 1985).

People v. McKibbins, 96 Ill.2d 176, 449 N.E.2d 821 (1983) Evidence of other crimes is admissible to prove modus operandi, intent, identity, motive, absence of mistake or "if it is relevant for any purpose other than to show the propensity to commit crime." See also, **People v. Phillips**, 127 Ill.2d 499, 538 N.E.2d 500 (1989).

People v. Lindgren, 79 Ill.2d 129, 402 N.E.2d 238 (1980) Evidence of another crime was improperly admitted to show that defendant was near the scene of the crime on trial. The State could have established defendant's presence without mentioning the other crime - "the same witness could testify to time and place proximity without mentioning a distinct crime . . . [and such] a limitation hinders the prosecution in no legitimate way." See also, **People v. Spiezio**, 105 Ill.App.3d 769, 434 N.E.2d 837 (2d Dist. 1982) (defendants could have been placed at the crime scene without reference to the unrelated crime); **People v. Bailey**, 88 Ill.App.3d 416, 410 N.E.2d 545 (3d Dist. 1980) ("Illinois law also requires that otherwise admissible evidence must be purged of references to other crimes if it is at all possible to do so without doing violence to the probative value of the evidence").

People v. Romero, 66 Ill.2d 325, 362 N.E.2d 288 (1977) Evidence of other crimes may not be introduced to enhance the credibility of witnesses. See also, **People v. Turner**, 78 Ill.App.3d 82, 396 N.E.2d 1139 (1st Dist. 1979).

People v. McDonald, 62 Ill.2d 448, 343 N.E.2d 489 (1975) Evidence showing that defendant committed a crime for which he is not on trial is improper when its purpose is to show defendant's propensity to commit crime. See also, **People v. Baptist**, 76 Ill.2d 19, 389 N.E.2d 1200 (1979).

People v. Lehman, 5 Ill.2d 337, 125 N.E.2d 506 (1955) Evidence of other crimes is objectionable "not because it has no appreciable probative value, but because it has too much." The law distrusts the inference that because a man committed other crimes he is more likely to have committed the current crime. Thus, where the testimony has no value beyond that inference, it is excluded.

Illinois Appellate Court

People v. Hunter, 2023 IL App (4th) 210595 Under 725 ILCS 5/115-7.3, the State may generally introduce evidence of other sex crimes for propensity purposes in a sex crime prosecution. In this case, defendant was charged with aggravated criminal sexual abuse for rubbing the buttocks and breasts of a 10 year-old girl. The State introduced evidence that, on previous occasions with two other similarly aged girls, defendant rubbed their backs, necks, thighs, stomachs, and hair. One of the girls told her grandmother that she laid on top of defendant.

Defendant argued on appeal that these incidents were not admissible under section 115-7.3 because the acts were not for sexual gratification or arousal and therefore not prior acts of aggravated criminal sexual abuse. He also alleged that the statement about laying on defendant was inadmissible hearsay, as it came in through the girls' grandmother.

The appellate court disagreed. Defendant was supervising these children while their parents were at church choir practice, and he moved the two girls to a different room before touching them extensively. Under these circumstances, it could be reasonably inferred that defendant's actions were for the purpose of sexual gratification or arousal, and therefore the acts met the requirements of section 115-7.3. Also, the statement to the grandmother was admissible as an excited utterance under Illinois Rule of Evidence 803(2). The statement was made by a 9 year-old shortly after being touched repeatedly by a 46 year-old man, and therefore was "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

Finally, the trial court erred when it failed provide pattern instruction 11.66, which is required whenever prior statements are admitted pursuant to 725 ILCS 5/115-10 ("instruct the jury that it is for the jury to determine the weight and credibility to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, *** the nature of the statement, the circumstances under which the statement was made, and any other relevant factor.") IPI 11.66 implements this provision. However, given the overwhelming evidence, and the inclusion of IPI 1.02, the general instruction on witness credibility, this error was not reviewable as plain error.

People v. Watts, 2022 IL App (4th) 210590 The trial court did not err in admitting evidence of defendant's prior sexual assaults of three other women pursuant to 725 ILCS 5/115-7.3. All three incidents shared facts in common with the charged offense. Specifically, defendant invited the women, who he knew, to hang out with him. Each rode in a vehicle with defendant, and all of the prior incidents involved the consumption of alcohol. Defendant assaulted each of the women at a time when they were unable to legally consent. While the charged incident did not involve alcohol, but rather a victim who could not consent because of her age, the differences were not enough to render the prior assault evidence more prejudicial than probative. And, while a significant amount of propensity evidence was admitted at defendant's trial, it did not amount to an improper "mini-trial" on the subject. The evidence was relatively straightforward, and was not "prosecutorial overkill" as in **People v. Cardamone**, 381 Ill. App. 3d 462 (2008).

Additionally, where the victim here claimed that defendant threatened self-harm in order to convince her to leave her home and meet him on the date in question, the court did not err in admitting evidence that defendant had made a similar threat to another individual on a prior occasion. That evidence showed defendant's use of such threats to manipulate others in order to get his way. Thus, his prior statements of self-harm were relevant, and it was not an abuse of discretion to admit them into evidence at trial.

Finally, the trial court did not err in allowing the State to introduce evidence of memes found on defendant's phone. The State asserted that the memes showed defendant's belief that it was appropriate to sexually assault incapacitated women. For authentication purposes, the court treated the memes like any other form of documentary evidence. A proper foundation for documentary evidence will be found where the proponent presents a rational basis from which a fact finder can conclude that the document belonged to or was authored by the party alleged. Here, there was no dispute that the phone belonged to defendant, and there was evidence that the memes were contained in text messages defendant exchanged with another person. Thus, there was evidence that the memes belonged to him, even if defendant did not author them. This was enough to render the memes admissible, and it was for the trier of fact to determine what weight to give them.

People v. Mujkovic, 2022 IL App (1st) 200717 Defendant was charged with first degree murder based on his shooting of another customer at a gas station. Defendant asserted self-defense, contending that he believed the other customer had a gun when he lunged at defendant's friend during an altercation. At trial, the State introduced evidence that defendant and his friend had been involved in two other shooting incidents on the night in question. In the first incident, defendant fired from his car at a group of people, striking one of them. And, in the second, defendant fired his gun out the car window into the air.

Defendant argued that the other-shooting evidence was improper propensity evidence. Illinois Rule of Evidence 404(b) generally prohibits the use of other bad acts to prove a defendant's propensity to commit crime. But, such acts may be admissible to prove some other point material to the controversy, such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Here, the other-shooting evidence was admissible on the question of intent. Defendant had put his intent directly at issue by asserting self-defense. Other-crimes evidence may be relevant to the question of intent because it tends to negate inadvertence, accident, self-defense, or other forms of "innocent intent." In this case, the court held that evidence of defendant's two prior unlawful shootings, occurring just hours earlier, makes the claim of innocent intent, in the form of self-defense, less likely. Thus, the other-shooting evidence was properly admitted for a non-propensity purpose.

People v. Valdez, 2022 IL App (1st) 181463 Where a defendant is accused of murder involving an act of domestic violence, the defendant's prior acts of domestic violence may be admissible as propensity evidence under 725 ILCS 5/115-7.4(a). The standard of proof for such evidence is low; specifically the State must show "more than a mere suspicion" that defendant committed, or at least participated in, the other alleged acts of abuse. A court's decision to admit such evidence is reviewed for an abuse of discretion.

Here, the court did not abuse its discretion when it allowed the introduction of evidence that the defendant's four-year-old son suffered a black eye just weeks before his death, even though the State did not produce direct evidence that it was the result of abuse, let alone abuse caused by defendant. The Appellate Court concluded that even without eyewitness testimony or an admission by defendant, there was "more than a mere suspicion" that defendant had caused the child's black eye where she had also recently been convicted of a separate act of domestic abuse against the minor child which had caused an identical injury. In that case, she confessed to the abuse and told authorities that she had anger issues and gets mad, and the child also reported that his mother had hit him.

Defendant also challenged the admission of evidence that an eyewitness had seen her slap the child a few weeks before his death, on the basis that the State had not included this

evidence in its pretrial motion to admit evidence under Section 115-7.4. The Appellate Court agreed, rejecting the State's argument that there was sufficient disclosure where the eyewitness statement was included in a police report that was turned over in pretrial discovery. In **People v. Peterson**, 2017 IL 120331, the Court held that under Illinois Rule of Evidence 404(c), the State must specifically disclose its intent to use other-crimes evidence at trial. Here, the State failed to provide the required notice where it omitted the eyewitness statement from its motion under Section 115-7.4. Accordingly, it should not have been admitted. The court went on to find the error harmless, however, given that there was ample additional evidence of defendant's guilt.

People v. Currie, 2022 IL App (4th) 210598 The trial court erred when it denied the State's motion to admit certified copies of defendant's prior domestic violence convictions pursuant to section 115-7.4.

First, the Appellate Court had jurisdiction to hear the State's interlocutory appeal. Rule 604(a)(1) allows the State to appeal from an order suppressing evidence. Here, the trial court ruled that it would not allow the State to present certified copies of defendant's prior convictions, but it would allow the complainant in those cases to testify. On appeal, defendant argued that the State's ability to call the witness meant that the court's order did not actually suppress any evidence. The Appellate Court disagreed. The State did not seek to admit testimony about the prior cases, it wanted to admit the fact that defendant was convicted. The former would be subject to cross-examination or contradictory testimony and might not be believed by the trier-of-fact. The latter was conclusive proof of defendant's convictions for those offenses. Thus, the order had the substantive effect of suppressing evidence for purposes of Rule 604(a)(1).

Next, the Appellate Court held that the court erred in denying the motion to admit the convictions under 725 ILCS 5/115-7.4. Under section 115-7.4, when a defendant is charged with domestic battery, "evidence of the defendant's commission of another offense or offenses of domestic violence is admissible, and may be considered for its bearing on any matter to which it is relevant." The evidence must be more probative than prejudicial, and "proof may be made by specific instances of conduct, testimony as to reputation, or testimony in the form of an expert opinion, except that the prosecution may offer reputation testimony only after the opposing party has offered that testimony."

The trial court denied the motion, finding that the copies of certified convictions, without any testimony or evidence to prove their context or relevant purpose, were substantially more prejudicial than probative.

The Appellate Court, reviewing the matter *de novo*, found that as a matter of law, section 115-7.4 allows the State to admit certified copies of conviction without any accompanying testimony or other evidence. It found that introduction of certified copies of conviction without additional details avoids prejudice and is the most conclusive way to prove defendant's status as having prior domestic violence convictions. Although the State should present the details of the offense to the trial court, so that it can make the threshold admissibility finding, once the trial court has determined the evidence is not unduly prejudicial, the State may introduce the certified copies of conviction. And while section 115-7.4 does not explicitly refer to certified copies of conviction as a form of proof, the Appellate Court found persuasive the reasoning of **People v. Fields I**, 2013 IL App (3d) 080829-B, which held that nothing in the statute restricts the type of evidence to the types of proofs listed in subsection (d) ("proof may be made by specific instances of conduct, testimony as to reputation, or testimony in the form of an expert opinion"). Looking to the intent of the statute, it would not make sense to preclude admission of certified copies of conviction, the

most conclusive type of evidence available. Thus, the Appellate Court agreed with the State that the fact of conviction falls under the category of proof of "specific instances of conduct."

People v. Panozzo, 2022 IL App (3d) 190499 Defendant was charged with violation of a no stalking order. The order prohibited defendant from making contact with Robert Mysliwiec, Sr., his wife, and his son, Robert Mysliwiec, Jr. ("Robby"). The information alleged that on July 23, 2014, defendant "made contact with Robert Mysliwiec," an act that was prohibited by the order.

Before trial, the State moved to introduce evidence of defendant's "course of conduct" concerning contact with the Mysliwiecs, alleging defendant put up yard decorations taunting the Mysliwiecs and threatened Robert in April of 2014. Defendant objected, noting the information alleged a specific incident, and it wasn't even clear which Robert defendant allegedly contacted. The State responded that the information referred to both Robert and Robby. The court granted the State's motion.

Robert testified that he lived next door to his son Robby, and that defendant lived two houses down. In April 2014, defendant yelled at him in an alley behind their homes. In May, defendant put up various yard signs and installations which Robert believed were aimed at his family. Robby testified that defendant "berated" him in July 2014 after Robby commented on the yard signs.

The court agreed to provide the jury with three verdict forms – one for the statement to Robert Sr., one for the statements to Robby, and one for the yard signs. The jury found defendant guilty of all three.

The Appellate Court reversed, agreeing with defendant that the information was deficient. Because the case involved two Robert Mysliwiecs, the State's failure to specify which was the victim resulted in a fatal variance. Furthermore, the addition of the "course of conduct" evidence, involving yard signs and contact with Robert, Sr., rendered the information duplicitous. A charging instrument is void for duplicity where two or more distinct offenses are charged in a single count. Although this information was not duplicitous on its face, it became duplicitous once the trial court allowed the State to proceed under multiple theories.

These errors were clearly prejudicial where defendant was taken by surprise when the State included the "course of conduct" evidence, and again when the court agreed to give the jury three verdict forms. Defendant repeatedly attempted to raise a first amendment defense which the court denied as untimely, despite the fact that defendant did not know about the yard sign charges until the start of trial.

Additionally, because the allegations regarding yard signs and Robert, Sr., were not legitimate charges, their introduction violated the rule against other-crimes evidence. The incidents served no legitimate purpose other than to portray defendant as a bad person.

Finally, the Appellate Court granted defendant's request for an outright reversal of his conviction rather than a new trial. Defendant had served his entire sentence at the time of the decision, so the Appellate Court had discretion to reverse the conviction outright under **People v. Campbell**, 224 Ill. 2d 80 (2006).

People v. Bedoya, 2021 IL App (2d) 191127 Under 725 ILCS 5/115-7.3, evidence of other sexual offenses need not be identical to the charged offense in order to be admissible at trial. Here, for instance, while there were differences as to where the incidents occurred and whether anyone else was present, they were sufficiently similar where the incidents all involved boys close in age and consisted of the same type of acts, specifically defendant touching the boys' penises. This was enough to render the other offenses admissible to

establish defendant's propensity to commit sex offenses under Section 115-7.3. And, the trial court properly weighed the potential prejudice against the probative value of the evidence when it admitted testimony from only two of the ten other-crimes witnesses whose testimony the State sought to introduce.

People v. McDaniel, 2021 IL App (2d) 190496 Where the trial court properly admitted evidence of defendant's prior sexual abuse against another individual as evidence of propensity and identity, it was not error for the court to give a modified version of IPI Criminal 3.14, instructing the jury it could consider the other-crimes evidence on the issues of identity and propensity. Defendant argued that reference to "propensity" in the instruction improperly highlighted the evidence. The court concluded, however, that mentioning only identity in the instruction would have rendered it incomplete, and both defendant and the State are entitled to jury instructions that fully and fairly set for the applicable law.

In reaching its decision, the court distinguished **People v. Potts**, 2021 IL App (1st) 161219, where the court stated that reference to "propensity" does not belong in IPI Criminal 3.14. In **Potts**, the court admitted evidence of the defendant's history of domestic violence for propensity purposes and also admitted evidence of other uncharged conduct on the issues of motive and state of mind. The court gave a version of IPI Criminal 3.14 instructing the jury it could consider the other crimes evidence on issues of propensity, motive, and state of mind, without delineating which evidence had been admitted for which purpose. Thus, the jury was told it could consider all of the other-crimes evidence for propensity, even though only the domestic violence evidence was admissible for that purpose. In its decision in **Potts**, the Appellate Court clarified that while the propensity language should not have been included in IPI 3.14, the State was entitled to have the jury instructed on the issue of propensity, albeit in a separate instruction. Here, on the other hand, combining propensity and identity into the single instruction was not error because the same evidence was admissible for both purposes.

People v. Lamonica, 2021 IL App (2d) 200136 Defendant was found guilty of aggravated criminal sexual assault under section 11-1.30(a)(2). To prove defendant guilty under this subsection, the State was required to prove that defendant committed an act of sexual penetration against the victim by the use of force and caused bodily harm. The Appellate Court found the evidence of "force" insufficient and reversed the conviction.

The complainant L.L. testified that defendant took her to a restaurant where she drank several glasses of wine, to the point of severe intoxication. She admitted that she invited defendant back to her apartment, with the assumption that they would engage in sexual intercourse. When they arrived at the apartment, L.L. took her dogs outside and fell down. The next thing she remembered was laying in her bed naked with defendant on top of her, digitally penetrating her. She told defendant to stop because it hurt, and after she agreed to oral copulation, they engaged in vaginal sex. The sex was so painful that L.L. began bawling, and told him it was painful, although she did not tell him to stop because she thought it would be futile. L.L. moved away, and told defendant to stop because he was hurting her. They argued, and she saw a vein pop in his neck, suggesting he was very angry and making her believe he would force himself on her or worse. At that point L.L. laid down and he again penetrated her vaginally. L.L. told him it hurt and told him to stop, eventually shoving him off and ending the encounter.

The Appellate Court rejected the argument that defendant used force during the digital penetration, or during either act of vaginal intercourse. First, defendant's act of forcing his fingers into L.L.'s vagina did not amount to the force necessary to prove criminal

sexual assault. Force does not include the force inherent to the act of physical penetration; instead, there must be some kind of physical compulsion, or threat thereof, that causes the victim to submit to the penetration against their will. Regarding the first act of vaginal penetration, L.L. never testified that this act began due to force or the threat of force, only that it was painful and that she eventually moved away rather than telling him to stop. With regard to the second act of vaginal penetration, defendant did not threaten L.L., and her subjective interpretation of defendant's neck vein as a threat was insufficient to qualify as an actual threat. Under the definition provided in section 11-0.1, an actual threat must be followed by a reasonable belief that the accused will act upon the threat. Here, there was no evidence that defendant threatened L.L. or that any perceived threat was reasonable.

The State argued that L.L. withdrew her consent when she told defendant, "stop, it hurts," near the end of the encounter. But the Appellate Court found that defendant did not prevent her from disengaging. When a defendant raises the affirmative defense of consent in an aggravated criminal sexual assault trial, the State has a burden of proof beyond a reasonable doubt on the issue of consent as well as on the issue of force. A person can passively force someone to continue with an act of sexual penetration by using one's bodily inertia to prevent the victim from disengaging, but here, defendant's bodily inertia did not prevent L.L. from disengaging. Rather, L.L. was able to push defendant off her, ending the penetration.

Despite reversing defendant's conviction for insufficient evidence, the court went on to hold that the trial court erred in admitting other-crimes evidence. At trial, three witnesses testified about a prior sexual assault. The State used this testimony to prove propensity under section 115-7.3 and as evidence of intent and lack of mistake. In that assault, E.S. alleged that defendant took her to a restaurant where she drank too much wine and ended up with defendant in her apartment. She further alleged that defendant forced himself on her in the morning. The court found E.S.'s unproven allegation was factually dissimilar to the charged conduct; other than defendant inviting E.S. and L.L. to wine bars, the two incidents bear little resemblance to one another in any significant way. Thus, the probative value was low and no reasonable person could conclude that the probative value outweighed the prejudicial effect.

People v. Potts, 2021 IL App (1st) 161219 In his murder trial, defendant's prior acts of domestic violence were admitted as propensity evidence. And additional other-crimes evidence was admitted for limited purposes such as motive and state of mind.

It was error for the court to give a single other-crimes instruction – a modified version of IPI 3.14 – which stated that the evidence had "been received on the issues of the defendant's propensity, motive, and state of mind" and could be considered for those purposes. This instruction left jurors with the impression that they could considered any of the other crimes evidence for propensity, which was incorrect. Instead, the jury instructions should delineate between which evidence may be considered for propensity and which is limited to specific purposes.

While trial counsel rendered deficient performance by failing to ensure proper instructions were given, defendant was not prejudiced where there was a contemporaneous limiting instruction given during trial as to the use of some of the other crimes evidence. Further, the additional other crimes evidence was minimal.

People v. Britt, 2020 IL App (3d) 170548 In a prosecution for violation of an order of protection, the State introduced a certified copy of defendant's prior conviction for domestic battery during its case-in-chief. Defense counsel explicitly stated that he had no objection.

The State also cross-examined defendant by asking if he had prior convictions for aggravated battery and aggravated criminal sexual abuse. Defendant replied in the affirmative. During its findings, the court mentioned defendant's prior convictions as part of the reason to credit the complainant's testimony and find defendant guilty.

On appeal, the State conceded that it was improper to introduce the domestic battery conviction into evidence during its case-in-chief. While the conviction enhanced defendant's offense from a misdemeanor to a Class 4 felony, it was not an element of the offense and therefore should not have been disclosed under 725 ILCS 5/111-3(c). The failure to object to this evidence prejudiced defendant because the court explicitly relied on the prior conviction in determining defendant's guilt. The Appellate Court further held that the State's method of impeachment by cross-examining defendant about his prior convictions, rather than introducing certified copies of conviction on rebuttal, was also improper.

People v. Kitch, 2019 IL App (3d) 170522 Pursuant to 725 ILCS 5/115-7.3, the trial court properly admitted two prior sex offense convictions from 13 years earlier at defendant's trial for predatory criminal sexual assault. While the defendant argued that the prior acts were too remote in time, defendant was incarcerated for seven of the 13 years, and therefore he had only spent six years outside of prison before his arrest on the current charges. Defendant also argued that the acts were not sufficiently similar because some of the common elements – vaginal touching of young girls in close relationships to defendant – are common in all predatory criminal sexual assault cases. The Appellate Court disagreed, noting the ages of the victims, the alleged acts, the circumstances of the acts, and the victims' relationship to defendant were nearly identical in both cases.

People v. Hinthorn, 2019 IL App (4th) 160818 Defendant's wife testified against him in a trial for the predatory criminal sexual assault of their daughter. Some of the counts alleged that defendant acted as an accomplice to his wife during one of the assaults. The State's pre-trial request to admit other crimes evidence of prior sexual assaults by defendant against his wife had been denied.

Defendant's wife testified that she was forced to engage in a sex act with her daughter out of fear that defendant would beat her. Defendant's cross-examination attacked this testimony by highlighting prior inconsistent statements. The trial court allowed the State to then admit the other crimes evidence because the cross-examination opened the door. The Appellate Court agreed, holding that under the doctrine of curative admissibility the other crimes evidence was necessary to give the jury the complete picture of the wife's state of mind. The Appellate Court rejected, however, the State's assertion that the evidence was admissible under the completeness doctrine, which applies to communications, not acts.

People v. Kelley, 2019 IL App (4th) 160598 At defendant's trial for the first degree murder of a woman he met through an escort service, the trial court did not err in allowing two other women to testify about prior acts of domestic violence under section 115-7.4. The defendant alleged that the testimony of these witnesses was not sufficiently similar to the instant offense where they took place under different circumstances. However, rejecting the holding of **People v. Johnson**, 406 Ill. App. 3d 805 (2d Dist. 2010), the Appellate Court found that the prior crimes do not need to involve similar details in order to be admissible. Unlike evidence admitted to show *modus operandi*, more general areas of similarity suffice for admission under 115-7.4. Here, where both prior incidents shared some general areas of similarity – brutal beatings of women with whom defendant was involved romantically or who took his money – the trial court did not abuse its discretion.

People v. Felton, 2019 IL App (3d) 150595 At defendant's bench trial on a charge of attempt murder, the trial court did not err in admitting evidence of defendant's prior home invasion because the State's theory was that the defendant attempted to kill the victim, who was also his accomplice in the home invasion, to prevent him from telling the police what he knew. The Appellate Court presumed that the trial judge only considered the evidence for the purpose for which it was admitted (motive), and her comments on the record confirmed as much. The Appellate Court cautioned, however, that the State introduced more evidence of the home invasion than necessary and that its opinion in this case should not serve as an endorsement of using extensive amounts of other-crimes evidence.

The Appellate Court also noted that the same judge had presided over both the home invasion and attempt murder trials, though the home invasion had been a jury trial. Although no challenge was raised to this procedure, the Court noted that it would have been "optimal" to have a different judge preside over the attempt murder case in this circumstance.

People v. Larke, 2018 IL App (3d) 160253 To prove the "threshold similarity" requirement for the admission of other crimes evidence (in this case to prove intent and knowledge), even the "bare minimum" description of the other crime may suffice. Here, it's clear from the crimes themselves – possession of cocaine with intent to deliver as the charged offense, and possession of cannabis with intent to deliver as the prior offense – that they were sufficiently similar.

People v. Talbert, 2018 IL App (1st) 160157 The admissibility of evidence of a crime committed by someone other than the defendant is not evaluated as "other crimes evidence," but rather is considered under traditional relevance standards. Evidence that defendant's cousin previously committed an arson against the residence of the victims in the instant case was relevant where the State's theory was that defendant shot the victims at his cousin's direction. Because the cousin's motive was relevant, the evidence of the cousin's prior interactions with the victims was relevant.

People v. Brown-Engel, 2018 IL App (3d) 160368 Attempt aggravated criminal sexual abuse is not an enumerated offense under section 115-7.3(b), and therefore evidence of defendant's prior sexual offenses against the victim were inadmissible as propensity evidence at defendant's trial. However, the prior bad acts could be used for relevant purposes other than propensity, including intent, under Rule 404(b). Although the court admitted the evidence pursuant to a motion to admit 115-7.3(b) evidence, the court's findings suggested that it considered the evidence only for purposes of intent.

People v. Cavette, 2018 IL App (4th) 150910 The court's statement to the jury that it should consider the stipulated evidence of defendant's two prior felony convictions "along with all of the other evidence of the case" was plain error. Defendant's prior convictions were admitted for the limited purpose of establishing the prior-felonies element of armed habitual criminal. While the court was not required to give a limiting instruction without one being requested, the court was required to give an accurate statement of the law to the jury when it spoke on the subject.

This was plain error under the closely-balanced evidence prong. Only a single eyewitness testified to having seen defendant with a gun. The gun and drugs were not found on defendant, but rather were recovered from a friend's apartment, and neither was forensically linked to defendant. The jury had been deadlocked prior to reaching a verdict,

and the court's erroneous instruction to consider defendant's criminal history the same as any other evidence threatened to tip the scales against defendant.

People v. Long, 2018 IL App (4th) 150919 The State violated the rule against prior consistent statements by asking its witness if the story he told police matched his testimony. The State also erred by cross-examining defendant about his prior convictions; impeachment via prior conviction must be effectuated via certified copy of conviction, not cross-examination. Finally, the prosecutor improperly vouched for its witness in closing, stating that he personally believed him to be truthful.

The Appellate Court found the errors harmless. The prior consistent statement was not actually introduced, and the State provided other substantial evidence of guilt. The prosecutor's expression of a personal belief was minor and the evidence supported an inference that the witness was credible.

People v. Clark, 2018 IL App (2d) 150608 Evidence of a witness's commission of another crime is not analyzed as "other crimes" evidence under Illinois Rule of Evidence 404(b). Instead, admissibility is evaluated under ordinary relevance principles. Here, defendant admitted participating in a robbery with the co-defendant, Nesbit, where Nesbit brandished a firearm. The sole issue before the jury was whether the gun displayed by Nesbit was real. At defendant's trial, Nesbit testified for the State. Nesbit's recent prior commission of an armed robbery with a real firearm was deemed relevant. Defendant's jury could reasonably infer use of a real firearm in this case based upon Nesbit's use of a real firearm in the prior armed robbery. The prejudicial impact of Nesbit's prior armed robbery did not outweigh its probative value where its use at defendant's trial was limited to the issue of whether the gun was real.

People v. Heller, 2017 IL App (4th) 140658 725 ILCS 5/115-7.4 provides that in domestic violence prosecutions, evidence of unrelated offenses of domestic violence may be admitted under specified circumstances and may be considered on any relevant matter. Thus, other crimes evidence admitted pursuant to §115-7.4 may be considered as showing mere propensity to commit the charged crime.

When instructing the jury in such a case, the trial court should not give IPI Criminal 4th No. 3.14 in its unmodified form, because the instruction limits the use of the other crimes evidence in a way that contradicts the statute. Here, the trial court erred by instructing the jury that the other crimes evidence was to be considered only on issues of factual similarity and proximity in time.

However, defendant forfeited review of the issue where defense counsel affirmatively acquiesced to the limiting instruction. Therefore, the Appellate Court declined to reach the issue.

People v. Rosado, 2017 IL App (1st) 143741 (modified upon denial of rehearing, 9/12/17) The State charged defendant with a series of drug transactions that occurred on March 18, 23, and 29, 2011. The State elected to try the March 29 transaction first. At trial defendant argued that his brother had sold the drugs and the jury acquitted him. The State next tried the March 23 transaction which is the subject of the present appeal. In that trial, the court allowed the State to admit evidence of the March 29 transaction as other-crimes evidence to prove defendant's identity. The court would not let defendant inform the jury that defendant had been acquitted.

At trial, an uncover officer testified that he purchased drugs from defendant on March 23. The officer also testified that he purchased drugs from defendant on March 29. The officer knew defendant's brother and testified that he did not mistakenly identify defendant in place of his brother. Defendant argued that the officer mistook defendant for his brother. The jury convicted defendant of the March 23 offense.

The Appellate Court held that the trial court improperly admitted the other-crimes evidence to prove identity. The officer could not explain how his ability to identify defendant on March 23 was increased based on a transaction with defendant that occurred six days later. Since this evidence could not bolster identification, and since it had no other relevance, it was improperly admitted.

The trial court also erred in excluding evidence that defendant had been acquitted. In **Ward**, 2011 IL 108690, the Supreme Court held that it was error to exclude evidence of defendant's acquittal in a case where the other-crimes evidence had been admitted as evidence of propensity in a sexual assault case under 725 ILCS 5/115-7.3. Although the evidence here was admitted to show identity, not propensity, nothing in **Ward** limited the holding to cases involving propensity.

People v. Jacobs, 2016 IL App (1st) 133881 Defendant was charged with possession of a stolen motor vehicle. At trial, the son of the owners of the vehicle testified that jewelry was taken from his parents' house at the same time the vehicle was stolen. The son testified that when he went to a pawn shop to see if he could find his mother's jewelry, he saw defendant drive the stolen car away from the store.

Before trial, the trial court granted a motion *in limine* excluding the evidence that jewelry had been taken from the home. However, the trial court overruled defense objections when the prosecutor mentioned the jewelry in opening argument. The trial judge then stated that the evidence was admissible to show that the car had been stolen.

The Appellate Court held that the evidence was improperly admitted as other crimes evidence, and was especially prejudicial where the trial court refused to allow defendant to present evidence that another person had been arrested for burglarizing the house.

Under the continuing-narrative exception, defendant's other bad acts are admissible when those acts are part of a continuing narrative which concerns the circumstances of the entire transaction and are not separate and distinct crimes. The continuing-narrative exception will not apply, even where crimes occur in close proximity, if the crimes are distinct and undertaken for different reasons at different places and times.

The Appellate Court concluded that even if the continuing narrative exception applied, the probative value of the evidence that jewelry was stolen was substantially outweighed by the prejudicial effect. The court noted that the State could have established that the son saw defendant driving the stolen vehicle without stating that the car had been at a pawn shop and creating an inference that defendant had been involved with the burglary and theft of the jewelry. The evidence was prejudicial to defendant not only because it created an unmistakable inference that he was involved in a crime for which he was not on trial, but also because it directly impacted his defense that he had been allowed to drive the car by an acquaintance and did not know it had been stolen.

People v. Fields, 2015 IL App (3rd) 080829-C 725 ILCS 5/115-7.3 provides that in prosecutions for certain offenses, evidence of other instances in which defendant committed one of the specified offenses may be admitted to show defendant's propensity to commit such crimes. Where defendant was tried for predatory criminal sexual assault of a child, criminal sexual assault, and aggravated criminal sexual abuse, the State was allowed to introduce a

certified copy of defendant's prior conviction for aggravated criminal sexual abuse against a different complainant and in a different county. The State was also allowed to present testimony by the complainant in the prior offense.

As a matter of first impression, the Appellate Court held that the conviction in this case must be reversed because after trial, the conviction in the case which was introduced as other crimes evidence was reversed. The court concluded that the reversal of the prior conviction constituted "new" evidence and required reversal because it undermined confidence in the outcome of the trial.

Noting that the instant case involved a credibility contest between defendant and the complainant and that there was no eyewitness testimony or physical evidence, the court concluded that the result of the trial would probably have been changed had the prior conviction been excluded. The court also noted that the facts of the cases were similar. Under these circumstances, admission of the underlying conviction was critical to the State's ability to secure a conviction.

The court rejected the State's argument that admission of the subsequently reversed conviction was harmless because in addition to presenting the certified conviction, the State presented the testimony of the complainant describing the circumstances of the earlier conviction. The court noted that at trial the State argued that admission of the prior conviction was "extremely probative" on the issue of propensity although the complainant's testimony was also being admitted. The court stated that in light of such argument in the lower court it would not accept the State's claim on appeal that the prior conviction "did not truly matter."

Defendant's conviction was reversed and the cause remanded for a new trial.

People v. Smith, 2015 IL App (4th) 130205 At defendant's trial for predatory criminal sexual assault of a child, aggravated criminal sexual abuse, and sexual exploitation of a child, the trial court found that §115-7.3 authorized the admission of evidence of similar conduct which defendant committed against other children some 12 to 18 years earlier. The Appellate Court found that the trial judge did not abuse its discretion by admitting the evidence, noting that the offenses were "remarkably similar" to the charges in this case and that the mere passage of time does not necessarily make the admission of prior offenses unduly prejudicial.

The court also noted that the trial court acted to limit the prejudice of the prior crime evidence when it barred testimony concerning prior conduct that was not similar to the allegations in the present case and twice read limiting instructions that were repeated by the State in closing argument. In addition, on cross-examination defense counsel was able to establish that no charges had been filed concerning the prior offenses. Finally, the State did not unduly emphasize the prior crimes evidence in closing argument.

Defendant's convictions were affirmed.

People v. Torres, 2015 IL App (1st) 120807 When the State seeks to admit evidence of prior acts of domestic violence under section 115-7.4, "it must disclose the evidence, including statements of witnesses or a *summary of the substance of any testimony*, at a reasonable time in advance of trial." 725 ILCS 5/115-7.4(c) (emphasis added). The term "summary" is not defined.

Defendant argued that the State provided an inadequate summary in its motion in limine to introduce evidence of prior acts of domestic violence, and thus prevented the trial court from properly analyzing the evidence and defendant from adequately opposing its admission.

As a matter of first impression, the Appellate Court held that the term "summary" involves "something less than a full disclosure of every detail of a witness's testimony," and "need not contain all that is required by an offer of proof." Here, the State's motion in limine provided details as to time, place, the victim, and the acts committed by defendant. The Court thus found no error in admitting the prior acts, and affirmed defendant's convictions.

People v. Cervantes, 2014 IL App (3d) 120745 When a defendant raises a theory of self-defense, the victim's violent character is relevant to the issue of which party was the initial aggressor. But evidence of defendant's violent character is admissible only when the defendant puts his own character at issue by introducing evidence that he is peaceful. **People v. Devine**, 199 Ill. App. 3d 1032 (3rd. Dist. 1990); **People v. Harris**, 224 Ill. App. 3d 649 (3rd. Dist. 1992).

In his jury trial for first degree murder, defendant raised self-defense and argued that the victim was the initial aggressor. To support his defense, he introduced evidence that the victim had a violent character. In rebuttal, the State was allowed to introduce three prior convictions of defendant for crimes of violence.

The Appellate Court held that the introduction of the prior crimes evidence was improper. The defense strategy focused on the victim's violent character but did not attempt to prove defendant's peaceful character. Accordingly, defendant's prior convictions were not admissible. The court specifically rejected the State's argument that when a defendant remains silent about his own character he is suggesting that he is peaceful. This argument ignores, and is contrary to, the presumption of innocence and the right to remain silent.

The erroneous admission of other crimes evidence creates a high risk of prejudice and ordinarily calls for reversal. Here the prejudice caused by the improper introduction of three prior convictions for violent crimes was magnified when the trial court gave an improper jury instruction that allowed the jury to consider as substantive evidence three other prior convictions that were properly admitted only to impeach defendant. Consequently, the Appellate Court reversed defendant's conviction and remanded for a new trial.

The dissenting justice would have held that **Devine** and **Harris** were wrongly decided and that the prior convictions were admissible. A defendant who raises an initial aggressor self-defense argument, but remains silent about his character at trial, necessarily suggests that he is peaceful. It would be "illogical and unfair" to allow defendant to introduce evidence of the victim's past violent acts but prevent the State from introducing similar evidence about the defendant.

People v. Baldwin, 2014 IL App (1st) 121725 725 ILCS 5/115-7.3 provides that where a defendant is accused of certain sex offenses, evidence of the commission of another sex offense may be admitted and considered for its bearing on any matter to which it is relevant. In weighing the probative value of the evidence against the risk of undue prejudice, the court may consider the proximity in time to the charged or predicate offense, the degree of factual similarity between the offenses, and any other relevant facts or circumstances. If the trial court admits the other crimes evidence, defendant is entitled to present rebuttal evidence. §115-7.3(b).

Defendant argued that at his trial for aggravated criminal sexual assault, the trial court erred by admitting evidence of a prior aggravated criminal sexual assault where defendant was acquitted on one count of aggravated criminal sexual assault concerning the earlier offense and the jury could not reach a verdict on the other count.

The court held that the trial judge did not err by admitting the prior offense. The plain language of the statute does not base the admissibility of the other crimes evidence on the

existence of a conviction, and does not preclude admission of such evidence where the defendant was acquitted of the other offense. Furthermore, the fact that defendant was acquitted did not necessarily mean that the evidence was inadmissible, because the State's inability to prove every element of its case beyond a reasonable doubt did not mean that it could not meet the standard for admissibility of other crimes evidence, which requires only that there be more than a mere suspicion that the other crime was committed by the defendant.

People v. Johnson, 2014 IL App (2d) 121004 At a jury trial for first degree murder and aggravated criminal sexual assault, the trial court admitted evidence that defendant allegedly committed three other sexual assaults against three different persons. One of the separate offenses occurred 11 years before the charged offenses, and the other two occurred within a few months after the charged offenses. The trial court admitted the other crimes on the issues of propensity, intent, motive, lack of mistake, and *modus operandi*.

The Appellate Court agreed with defendant that the other crimes evidence was inadmissable for the asserted purposes, but found that it was properly admitted as propensity evidence. Before evidence may be admitted under §115-7.3(b), the trial court must weigh the probative value of the evidence against the undue prejudice it might cause. The admissibility of the evidence rests within the discretion of the trial court, whose decision will not be disturbed absent an abuse of discretion.

Here, the trial court erred by admitting the other crimes for motive, lack of mistake, and *modus operandi*. Because defendant maintained that the sexual intercourse was consensual, neither *modus operandi* nor lack of mistake was at issue. Furthermore, there was nothing in the record to suggest that the other crimes created a motive to commit the instant offense, especially where two of the other crimes occurred after the charged crime and the other occurred several years earlier.

The court concluded, however, that the other crimes evidence was relevant to show defendant's intent and propensity to commit sex offenses, and was therefore properly admitted. The court rejected the State's argument that under **People v. Perez**, 2012 IL App (2d) 100865, evidence that is admitted pursuant to §115-7.3(b) is admitted without limitation concerning its use. The court concluded that because §115-7.3 authorizes the use of other crimes evidence only if relevant and where the probative value is not outweighed by the prejudicial effect, evidence is admissible only on matters that are relevant under the facts of the case.

The court also rejected defendant's argument that reversible error occurred when the jury was instructed that it could consider the other crimes evidence not only for propensity and intent but also for motive, lack of mistake, and *modus operandi*. First, the trial court was not required to give any limiting instruction. Second, precedent holds that where a limiting instruction permits a jury to consider other crimes evidence for a number of reasons, and one of those reasons is determined on appeal to be improper, the conviction must be affirmed despite the overly broad instruction.

Defendant's convictions for first degree murder and aggravated criminal sexual assault were affirmed.

People v. Young, 2013 IL App (2d) 120167 Where defendant was charged with unlawful possession of less than 15 grams of cocaine, and evidence of defendant's previous drug use and drug purchases was admitted on the issues of knowledge and intent, it was plain error to instruct the jury that it could consider the prior drug crimes in determining "defendant's knowledge and possession." Because the defendant was charged with possession of a

controlled substance, allowing the previous drug offenses to be considered on the issue of possession erroneously implied that the other drug crimes could be used to show a propensity to commit drug offenses. The court stressed that the trial court should have ensured that the instructions limited the jury's use of the evidence to properly admitted purposes.

However, the court concluded that the error was harmless where the evidence was not closely balanced and there was no serious risk that the jurors convicted defendant because they did not understand the law.

People v. Barnes, 2013 IL App (1st) 112873 Defendant was charged with heinous battery and aggravated battery of a child after a four-year-old child in his care suffered severe burns when he was exposed to hot water. The court concluded that the trial court abused its discretion by allowing the assistant State's Attorney to use the child as an exhibit by pulling down his pants, picking him up, and showing the jury the scars on his side and legs.

Although permanent disfigurement is an element of heinous battery, using the child as an exhibit was cumulative where the State had already established permanent disfigurement through photographs and expert testimony. The court also found that due to the risk of inflaming the jury's passions, the prejudicial effect of using the child as an exhibit outweighed any probative value.

Before presenting evidence of other crimes, the State must meet the threshold requirement of showing that a crime took place and that defendant participated in it. It is unnecessary to prove beyond a reasonable doubt that the defendant participated in the crime, but the State is required to present more than a mere suspicion of defendant's involvement.

Here, the court concluded that whether analyzed as other crimes evidence or under general relevancy principles, the trial court erred by admitting evidence that the four-year-old victim suffered a liver contusion at some point. Defendant was charged with injuring the child by exposing him to hot water. The State's expert testified that the child's blood work indicated that he had suffered a liver contusion at some point within the 24 to 36-hour-period before he was examined at the emergency room. The State's expert also admitted that the liver contusion may have had an explanation other than child abuse and that there were no signs of bruising on the child's abdomen. Defendant did not have sole custody of the child in the 24 to 36-hour-period preceding the examination.

In finding an abuse of discretion, the court concluded that the probative value of the evidence was tenuous and that there was only mere suspicion that defendant was responsible for the injury. In addition, the evidence was highly prejudicial because the jury would be more likely to convict the defendant of the charged crimes if it believed that he was also responsible for a separate injury.

The court concluded that the combination of errors caused manifest prejudice to the defense. The alleged justification for using the child as an exhibit was to establish the permanent disfigurement element of heinous battery. However, defendant did not dispute the cause or extent of the child's injuries, and the only issue was whether the defendant acted intentionally. Under these circumstances, it was unnecessary to display the child to the jury.

In addition, the evidence of defendant's intent was closely balanced. The jury chose to acquit of heinous battery, and there was testimony that defendant had cared for the child on several prior occasions without incident. Under these circumstances, the combined prejudice of displaying the four-year-old's physical scars and admitting evidence of an injury which could have been inflicted by someone other than the defendant could well have affected the verdict.

Defendant's conviction was reversed and the cause remanded for a new trial.

People v. Gist, 2013 IL App (2d) 111140 Where defendant was charged with aggravated battery of a child, aggravated domestic battery, and aggravated battery for allegedly striking his son in the chest, the trial court did not abuse its discretion by denying the State's motion *in limine* to admit prior acts of domestic violence which defendant allegedly committed against his son. The State's proffer stated that defendant's older son would testify that he had seen defendant strike the victim with a belt, defendant's wife would testify that she had seen defendant punch the victim in the stomach and hit him with a belt, and a witness from DCFS would testify that defendant had admitted disciplining the victim with a belt. The State argued that the evidence was relevant to show defendant's intent, motive and propensity to commit acts of domestic violence. At the trial court's direction, the defendant's wife testified at the hearing on the motion to admit the other crimes evidence, but testified only about one incident in which defendant struck the victim but the witness could not see the blow.

The court rejected the State's argument that *de novo* review applied because the trial court mistakenly believed that a witness's credibility is relevant to whether other crimes evidence is more probative than prejudicial. The court concluded that the trial judge excluded the evidence not because he believed the witness to be incredible, but because the evidence was unduly prejudicial in that the witness had not actually seen the blow and because a single incident does not establish a pattern of violence. Because the trial court's ruling was not an abuse of discretion, the order denying the motion *in limine* was affirmed.

People v. Sundling, 2012 IL App (2d) 070455-B Defendant was charged with aggravated criminal sexual abuse against two children. The court concluded that the trial judge erred by admitting three prior convictions for sex offenses against children.

The court held that it was error to admit a 1984 Cook County conviction for indecent liberties and a 1997 Michigan conviction for attempted criminal sexual conduct with a person under the age of 13, because the only evidence consisted of certified copies and a docketing statement for the Cook County case and a copy of the charge and sentencing order in the Michigan case. Because the supporting evidence was insufficient to permit the trial court to determine that there were similarities between the prior offenses and the instant charges, the evidence should have been excluded.

Similarly, the trial court erred by admitting a 1997 Indiana conviction for child molestation. Although the State introduced a probable cause affidavit from the Indiana case, the affidavit should have been excluded for two reasons. First, the affidavit lacked sufficient indicia of reliability concerning the conduct underlying the conviction because it related to the original charges, not to a subsequent guilty plea which defendant entered after an Appellate Court in Indiana overturned the original conviction.

Second, the affidavit was inadmissible hearsay because it was an out-of-court statement offered to prove the truth of the matters asserted. The court found that the affidavit could not qualify for the business record exception to the hearsay rule; the business record exception does not apply to documents which are prepared in anticipation of litigation, and a probable cause affidavit is clearly created for purposes of litigation.

However, the court concluded that the erroneous admission of the other crimes evidence was not plain error. The defendant did not claim that the error was so serious that it affected the fairness of the trial and challenged the integrity of the process, and the court concluded that the evidence was not closely balanced.

Defendant's convictions for aggravated criminal sexual abuse were affirmed.

People v. Moore, 2012 IL App (1st) 100857 A videotape of a police interrogation of defendant contained references to: (1) a prior incident of domestic violence in which defendant punched a woman and broke her jaw after finding her with another man; defendant apparently pled guilty to this charge; (2) defendant's prior history of robberies; and (3) defendant's prior history as a drug dealer and membership in a street gang. This other-crime evidence was irrelevant and unfairly prejudicial. Had defense counsel objected to this evidence, it would have been excluded.

People v. Hale, 2012 IL App (1st) 103537 Defendant made a statement to the police admitting his involvement in two shootings. According to the statement, defendant and his companions were driving around armed with guns with the intent to retaliate against a person named Mario. When they exited their car to look for Mario, they were fired upon, and fired back in self-defense. Defendant believed that someone had been shot during that exchange of gunfire, and in fact an innocent bystander was struck by bullets. Several minutes later and several blocks from the first shooting, defendant and his companions fired at a car they believed to contain Mario.

The trial court denied the State's motion *in limine* to admit evidence of the first shooting at defendant's trial for the second shooting under the continuing-narrative exception, finding it more prejudicial than probative. The court noted that it would reconsider its ruling if the defense attacked the integrity of defendant's statement in any way.

The Appellate Court held that the trial court abused its discretion in excluding the other-crime evidence. The evidence of the first shooting was offered to prove the ongoing motive of defendant and his companions to locate and shoot Mario. Even though they did not initiate the gunfire in the earlier shooting, they had exited their car with the intent to locate and shoot Mario. Therefore, the two shootings were not separate and distinct. The evidence of the earlier shooting proved defendant's intent and a common criminal design supporting defendant's accountability for the later shooting.

The other-crime evidence was also admissible to corroborate defendant's confession as the police were not aware of his participation in the first shooting at the time he made the admission. Although the trial court had ruled that it would allow admission of the other-crime evidence if the defendant challenged the statement, the State was entitled to establish the accuracy and reliability of the statement in its case- in-chief. The trier of fact must determine the weight and reliability of the statement regardless of whether defendant challenges its reliability.

The Appellate Court further held that any danger that the case would become a mini-trial on the first shooting would be avoided by holding the State to its proffer that it only intended to offer the testimony of the victim of the earlier shooting that she heard gunshots and was shot at a particular location, but was unable to identify the perpetrator. The probative value of this evidence substantially outweighed its risk of unfair prejudice.

Cunningham, J., dissented. The abuse-of-discretion standard is the most deferential standard of review. An abuse of discretion occurs only when no reasonable person would agree with the trial court's decision. The majority simply substituted its judgment for that of the trial court. There was no legitimate reason to admit the evidence of the earlier shooting. Taking defendant's statement at face value, the exclusion of evidence of the first shooting created no risk of jury confusion. The only commonality between the two shootings was the search for Mario. The trial court's judgment that the probative value of the evidence of the first shooting was outweighed by its prejudicial effect of creating the impression of a crime spree was not an abuse of discretion.

People v. Abernathy, 402 Ill.App.3d 736, 931 N.E.2d 345, 2010 WL 2673073 (4th Dist. 2010) Other crimes evidence may be admitted if it is part of a "continuing narrative" of the events giving rise to the offense. Thus, evidence may be admitted if it is intertwined with the offense charged, even if an uncharged offense is disclosed.

Where defendant was charged with an aggravated domestic battery in his residence, evidence that a fire was set at the same location a few minutes later was part of a continuing narrative of the circumstances surrounding the battery, rather than evidence of a separate and distinct crime. The court stressed that the battery and fire occurred at the same location, the fire destroyed some of the evidence of the battery, the fire was started within minutes after the battery, and two of the officers assigned to investigate the battery began their inquiry at the scene of the fire. Under these circumstances, the continuing narrative theory applied.

Under the "consciousness of guilt" theory for admitting other crimes evidence, evidence that the defendant attempted to conceal his involvement in a crime, either by destroying evidence or attempting to eliminate a witness, is admissible even if an uncharged crime is disclosed. Here, the trial court properly admitted evidence that defendant committed arson in order to conceal evidence that he had committed domestic aggravated battery.

The better practice is for the trial court to instruct the jury of the limited purpose of other crimes evidence both at the time the evidence is admitted and at the close of the case. However, reversal was not required where the trial court gave only an instruction at the close of trial.

People v. Everhart, 405 Ill.App.3d 687, 939 N.E.2d 82 (1st Dist. 2010) Evidence of a prior sex offense was properly admitted on the issue of defendant's propensity to commit sex crimes. First, the prior offense was not too remote to be admitted although it occurred nearly 11 years before the current offense. There is no bright line rule governing whether prior convictions are too old to be admitted under § 115-7.3; instead, the age of the prior conviction is one factor to be considered in evaluating probative value.

The court noted that when defendant's in-custody time was deducted, the lapse between the offenses was less than six years. "We do not believe the gap of six years renders the prior offense too remote as to be an abuse of discretion on this factor alone."

Furthermore, there was sufficient similarity between the offenses to justify admission of the prior offense to show propensity. Where evidence is offered for some purpose other than *modus operandi*, only general areas of similarity are required to justify admission. Here, the offenses were sufficiently similar because both attacks occurred after midnight while the complainants were alone (in a parking lot or unlocking an apartment door), both women were moved to secluded locations, both women were told to remove the same items of clothing, and both women were positioned to face away from the defendant and threatened with what each believed to be a firearm. Furthermore, the perpetrator spoke to both women during the assault, tried to prevent both women from seeing his face, and took the purses of both women after the offense.

The court rejected the argument that significant differences between the cases rendered them insufficiently similar to be probative. For example, although the ages of the complainants differed by 15 years, the court noted that each complainant was approximately the same age as the defendant when the offenses occurred. Similarly, the fact that the attacks differed in length was insignificant because neither complainant knew exactly how long the assault had lasted. Finally, the court concluded that the differences in the type of penetration in each case did not negate the factual similarities between the crimes.

People v. Harding, 401 Ill.App.3d 482, 929 N.E.2d 597 (1st Dist. 2010) Evidence of crimes other than the offense with which the defendant is charged may not be admitted to show general criminal propensity, but may be admitted if relevant for other purposes, including intent. Other crimes evidence should be admitted only if sufficiently relevant concerning a proper issue to avoid the risk that the jury will consider it merely as showing propensity.

One factor in determining relevancy is whether the uncharged crimes are sufficiently similar to the charged crime to be probative of a contested issue. Only "general similarity" between the charged and prior offenses is required when other crimes evidence is admitted on the issue of intent.

The prosecution's statement of its purpose for introducing other crimes evidence does not remove the need for the trial court to make an independent determination of relevance.

Where the defendant was charged with child abduction for attempting to lure children to his car by offering them rides, evidence of prior convictions for attempted aggravated criminal sexual assault and attempted criminal sexual assault was insufficiently similar to the charged crime to justify admission on the issue of intent. The prior crimes involved forcible attacks on adult women who were followed on foot as they left bars, and offered no insight into defendant's intentions when he offered rides to elementary school girls in broad daylight. Instead, the prior offenses merely showed a propensity to commit sexual crimes.

The court rejected the State's arguments that the crimes were sufficiently similar to be admissible because all of the victims were females who were strangers to the defendant; "[w]e are aware of no authority permitting the admission of prior crimes on the basis of such broad generalities."

Defendant's convictions were reversed and the cause remanded for a new trial.

People v. Johnson, 406 Ill.App.3d 805, 941 N.E.2d 242 (1st Dist. 2010) For two reasons, the trial court erred at a trial for aggravated criminal sexual assault when it admitted evidence that 18 months after the charged offense, defendant and another man sexually assaulted a different complainant. First, the trial court considered only whether the other crimes evidence was probative, and did not weigh the probative value against any undue prejudice. Second, there were substantial dissimilarities between the offenses. In the charged offense, the complainant was accosted by a single man as she walked past an alley. In the uncharged offense, the complainant was forced into a car and assaulted by two men who blew cocaine in her face and gave her alcohol. In addition, the type of penetration differed between the cases.

In view of the "significant dissimilarities" between the offenses, the court concluded that the probative value of the uncharged offense was substantially outweighed by the prejudicial effect. Thus, the trial court abused its discretion by admitting the evidence.

However, the error was harmless because it did not likely influence the jury's verdict. The court concluded that a rational trier of fact could easily have convicted defendant based on the complainant's testimony identifying him, the properly admitted medical evidence, and an expert opinion based on DNA analysis.

People v. Raymond, 404 Ill.App.3d 1028, 938 N.E.2d 131 (1st Dist. 2010) The court concluded that the following similarities were sufficient to uphold admission of the other crime evidence, even though some dissimilarities did exist between the offenses and some of the similarities were generic: the offenses occurred within four years of each other; both victims were female, in the same age range of 12-14; defendant was significantly older (19 and 23); the encounters were in places where defendant was not permitted to be, but were

places the victims were familiar with; and the encounters began as consensual and involved vaginal penetration.

People v. Smith, 406 Ill.App.3d 747, 941 N.E.2d 419 (3d Dist. 2010) In derogation of common law, 725 ILCS 5/115-7.3 allows admission of evidence of other sex offenses committed by defendant for any proper purpose, including proof of his propensity to commit sex offenses, where defendant is charged with sex offenses. The statute also provides that when weighing the probative value of the other-offense evidence against undue prejudice, the court may consider: (1) the proximity in time to the charged offense; (2) the degree of factual similarity to the charged offense; and (3) other relevant facts and circumstances. 725 ILCS 5/115-7.3(c).

Defendant was charged with fondling his granddaughter's vagina outside of her clothing in 2005. The State sought to admit evidence that defendant had committed: (1) forced acts of sexual intercourse with his sisters in the 1960s and 1970s; (2) acts of digital penetration and rubbing of the vaginal area under the clothing of his daughters in the 1970s and 1980s; and (3) acts of touching the vaginal area of another granddaughter outside of her clothing five years before the charged offense.

The court did not abuse its discretion in excluding evidence of the sex offenses committed against the defendant's sisters and daughters. Evidence of those offenses was not only stale due to their extreme remoteness in time, they constituted evidence of uncharged and unproven allegations of sexual offenses dissimilar to and more heinous than the charged offense. The court did allow the State to admit evidence of the offense committed against the other granddaughter, which was most similar to and therefore most probative of the charged offense.

The sheer volume of other-crime evidence proffered by the State also created a risk that evidence would become a focal point of the trial and lead the jury to convict defendant based on those crimes alone, rather than the charged offense. Contrary to **People v. Watson**, 386 Ill.App.3d 598, 900 N.E.2d 267 (2d Dist. 2008), this concern is not inconsequential where the other-crime evidence is offered to prove propensity. The court must still take care to ensure that it admits only so much evidence as is reasonably necessary to prove propensity.

The Appellate Court affirmed the trial court's order excluding evidence of the offenses committed against defendant's sisters and daughters.

People v. Cardamone, 381 Ill.App.3d 462, 885 N.E.2d 1159 (2d Dist. 2008) 725 ILCS 5/115-7.3 provides that when a defendant is accused of certain sexual offenses against children, evidence of similar offenses are admissible for any relevant purpose, provided that the probative value of the evidence is not outweighed by the prejudicial effect.

Such evidence was relevant in this case to show defendant's propensity to commit the charged offenses, but the prejudicial effect of the evidence far outweighed the probative value. Defendant, a gymnastics coach, was convicted of nine counts of aggravated criminal sexual abuse against seven girls. However, the seven complainants testified not only to the 26 acts that were charged, but that defendant also committed between 158 and 257 uncharged offenses. In addition, the trial court admitted evidence of additional uncharged acts committed against persons other than the complainants. Because no reasonable person could have believed that the probative value of such evidence was greater than the prejudicial effect, the trial court abused its discretion by admitting the evidence.

The other crimes evidence forced defendant to account for his whereabouts and behavior almost every day of a three-year period. In addition, some of the allegations

appeared to have been disclosed for the first time at trial, making it almost impossible for defendant to defend himself.

In view of the extensive other crimes evidence submitted, the trial court erred by refusing defendant's request to instruct the jury that it was required to unanimously find defendant's guilt as to each crime charged. The instructions defining the charges did not provide dates of the alleged conduct or describe the allegations clearly enough that the jury would necessarily base its verdicts on findings concerning the same acts. "[W]here the majority of the State's case involved uncharged offenses that allegedly occurred in the same time frame as the charged offenses, a separate instruction that the jury had to be unanimous regarding the charges was warranted."

People v. Holmes, 383 Ill.App.3d 506, 890 N.E.2d 1045 (1st Dist. 2008) Under common law, other crimes evidence was generally prohibited to show one's propensity to commit the charged crime. By enacting 725 ILCS 5/115-7.3, which in sex offense prosecutions allows other crimes evidence for any purpose for which it is relevant, the legislature intended to modify the traditional rule and permit propensity evidence in certain circumstances. In determining whether propensity evidence is admissible under §115-7.3, the court must weigh probative value and prejudicial effect in light of several statutory factors, including: (1) the proximity in time between the charged and uncharged offenses; (2) the degree of factual similarity between the offenses; and (3) any other relevant facts and circumstances. The trial court's decision to admit or deny propensity evidence is reviewed under the abuse of discretion standard.

The trial court abused its discretion by excluding a prior sexual battery conviction. Although nine years elapsed between the prior and charged offenses, defendant was incarcerated for five of those years. In addition, the sexual battery conviction had a number of similarities to the charges for which defendant was being tried, including that both victims were women who had relationships with defendant but refused to continue those relationships, both offenses occurred in broad daylight, and both women were assaulted at knife point. In addition, defendant punched both victims to immobilize them and brought both to his parents' home during or after the attack. Other similarities included that defendant claimed both women consented to having sex and medical documentation supported the claims of physical assaults and sexual trauma.

In determining that the probative value of the nine-year-old conviction was greater than the prejudice, the credibility issue raised by the complainant's response to the supplemental discovery motion was an appropriate factor to consider. Propensity evidence is disfavored not because it is irrelevant, but because it is overly persuasive to the point of enticing a jury to convict only because defendant is a bad person who deserves punishment. The existence of motive or bias on the part of the complainant reduces the likelihood that defendant would be convicted merely because of the propensity evidence, and therefore makes propensity evidence less prejudicial.

Also, a conviction for attempted forcible rape which occurred seven years before the offense for which defendant was on trial was properly excluded by the trial court. Because the details of the assaults were not similar and the conviction was entered as part of a plea negotiation involving other charges, "admitting this conviction would be more prejudicial than probative." See also, **People v. Taylor**, 383 Ill.App.3d 591, 890 N.E.2d 1108 (1st Dist. 2008) (trial court abused its discretion by excluding evidence of prior sexual offenses under §115-7.3; the offenses occurred only six years apart and had several similarities).

People v. Bedoya, 325 Ill.App.3d 926, 758 N.E.2d 366 (1st Dist. 2001) At defendant's trial for the first degree murder of a bouncer in a bar, the State was allowed to introduce evidence that before the altercation defendant (an off-duty Milwaukee police officer) fired shots at several buildings, including two hotels and the residence of Cardinal Bernadine. The trial judge erred by admitting the other crimes evidence.

The uncharged crimes were not sufficiently similar to the charged offense to be admitted. Defendant was charged with killing the bouncer by firing at him at close range during a struggle, while the prior incidents involved shots fired randomly from a moving car and did not involve intent to shoot persons in the buildings. There were no common victims between the charged and uncharged offenses, which were separated by 45 minutes to an hour and did not occur in the same geographical area.

Even if the evidence had some slight probative value, it should have been excluded because it was unfairly prejudicial. The uncharged crimes had only "slight probative value" but were extremely prejudicial, especially in light of the "excruciating detail[s]" that were presented, the prosecutor's argument focusing on the uncharged crimes, the trial court's failure to give a limiting instruction when the evidence was admitted, and the refusal to inform the jury that at a previous trial defendant had been acquitted of the uncharged offenses. Concerning the latter point, in interests of fairness, the jury should be informed when defendant has been acquitted of charges concerning criminal conduct that is admitted as other crimes evidence.

People v. Brown, 319 Ill.App.3d 89, 745 N.E.2d 173 (4th Dist. 2001) Even where other crimes evidence is admissible, the trial court must carefully limit the evidence to that which is relevant to the case. Cumulative evidence of uncharged conduct may prejudice defendant by "overpersuading" the jury that defendant is a bad person and may lead to a conviction for reasons other than defendant's guilt of the crime charged.

The admission of excessive other crimes evidence "switched the focus of the trial to the prior incident." Four of the State's 12 witnesses testified only about the prior incident, and two others testified about the prior incident in addition to the charged crime. Thus, half of the State's witnesses testified about the uncharged conduct. Much of the testimony about the prior crime was repetitive.

In addition, the trial court erred by omitting the word "only" from IPI 3.14, which informed the jury of the purposes for which the other crimes evidence could be considered. The instruction given by the judge failed to convey correct principles of law and caused the jury to ask a question during deliberations.

Finally, because "other-conduct evidence poses a risk of significant prejudice . . ., this court has suggested trial courts not only instruct the jury . . . at the close of the case, but also at the time the evidence is first presented to the jury."

People v. Hansen, 313 Ill.App.3d 491, 729 N.E.2d 934 (1st Dist. 2000) Evidence of other crimes generally is inadmissible to establish that a defendant has the propensity to commit crimes, but is admissible for any proper purpose, including to establish motive, intent, identity, absence of mistake, existence of a plan or design, and modus operandi. Even where such evidence is relevant to legitimate issues, however, it is admissible only if it is shown that: (1) the other crime actually occurred and (2) defendant participated in its commission. Although these showings need not be beyond a reasonable doubt, they must be proven by more than mere suspicion.

Further, other crimes evidence should be excluded if the prejudicial effect substantially outweighs the probative value. Whether other crimes evidence should be admitted lies in the trial court's discretion, which will not be reversed absent a clear abuse.

Evidence of defendant's pedophilia was not admissible for any proper purpose at his trial for the murder of three boys. The evidence was not admissible to prove motive and intent, because most of the evidence pertained to incidents that occurred in the 20-year-period after the decedents' murders. Nor was the evidence relevant to the issue of common design or plan; the mere presence of factual similarities between crimes does not justify an inference of a common design or scheme.

The evidence established that over 20 years defendant either "picked up, or directed others to pick up, numerous young male hitchhikers" with whom he engaged in sexual activity, but did not establish that defendant committed any particular, identifiable act of sexual assault against any person, including the victims here.

People v. Miller, 311 Ill.App.3d 772, 725 N.E.2d 48 (5th Dist. 2000) At a trial for the sexual abuse of a child, the trial judge erred by admitting evidence that defendant told police he had "done a lot of bad things." Such testimony was misleading; defendant actually said that he had done a lot of bad things "in the past," a qualification that was omitted when the statement was introduced. In addition, admission of the evidence placed defendant in the "untenable position" of being able to explain the meaning of the statement only by revealing a prior juvenile adjudication that the trial court had ruled inadmissible.

The statement also constituted evidence of other crimes and therefore could be admitted only if relevant to establish a material point other than defendant's propensity to commit crime. The statement had no probative value on any material question and was highly prejudicial; it should have been excluded.

People v. Lewis, 305 Ill.App.3d 665, 712 N.E.2d 401 (2d Dist. 1999) At defendant's trial for child pornography, the trial judge erred by admitting evidence suggesting that defendant was prone to commit crimes against children. Such evidence was not relevant to show defendant's intent when he took the photograph in question, as it did not relate to the elements of child pornography and defendant's intent was not at issue.

People v. Harris, 288 Ill.App.3d 597, 681 N.E.2d 602 (1st Dist. 1997) Defense counsel was not ineffective although he failed to request a limiting instruction when other crimes evidence was admitted. However, because evidence of other crimes carries a severe risk of unfair prejudice, trial judges should recognize the "potential peril, whether or not defense counsel first proposes a limiting instruction." The court should give IPI 3.13 both at the time the other crimes evidence is presented to the jury and at the close of the case.

People v. McMillen, 281 Ill.App.3d 247, 666 N.E.2d 812 (1st Dist. 1996) Plain error occurred where the State presented evidence of an unrelated burglary and defendant's confessions to two other murders. The State argued that the evidence of other crimes was properly admitted because defendant raised an insanity defense. The State argued that where defendant's sanity is in issue, "practically every event in a defendant's life is relevant . . . including [his] criminal history." Quoting **People v. Glenn**, 233 Ill.App.3d 666, 599 N.E.2d 1220 (1st Dist. 1992).

Despite **Glenn**, even where an insanity defense is raised evidence of past criminal conduct must be "relevant to the sanity dispute at trial." The probative value of the evidence must outweigh its prejudicial effect, and to the extent possible, references to other crimes

must be purged. Otherwise, there exists an unacceptable risk that the jury will reject the insanity defense in the belief that defendant is an evil person rather than because guilt has been proven.

People v. Pitts, 257 Ill.App.3d 949, 629 N.E.2d 770 (4th Dist. 1994) At the scene of the offense, police found a key that fit the door of defendant's apartment. Before trial, the State announced that it intended to call defendant's probation officer to testify about defendant's address. The prosecutor refused defense counsel's offer to stipulate to the address and conceded that he also intended to call defendant's building manager to confirm the address and to testify that the key fit defendant's lock. The trial court allowed the probation officer's testimony but instructed the jury to consider it only on the issue of identification.

The probation officer's testimony constituted inadmissible evidence of other crimes. By presenting the building manager's testimony that the key fit defendant's door, the State convincingly proved that defendant lived at the address in question. Thus, there was no legitimate question about identity, and the only conceivable purpose for the probation officer's testimony was to advise the jury of defendant's prior criminal record.

People v. Chambers, 259 Ill.App.3d 631, 631 N.E.2d 817 (2d Dist. 1994) As a matter of plain error, the trial judge erred by admitting a psychiatrist's extensive testimony about defendant's criminal history. Although an expert testifying on the issue of sanity may explain the basis of his opinion by disclosing materials on which he relied, the detailed recital of defendant's criminal past given here had at best only marginal relevancy to the issue of sanity. Defendant's prior criminal acts related mainly to whether he possessed a violent personality, an issue on which both sides agreed. The insanity defense, by contrast, turned on whether the combination of intoxication and personality disorders rendered defendant incapable of forming the required criminal intent. Because defendant's prior criminal conduct was not directly relevant to the issue of insanity, and the experts agreed as to defendant's general psychiatric condition, the trial court's ruling "essentially allowed [the State expert] to offer generally inadmissible evidence, containing a high degree of unfair prejudice, to shore up a conclusion that was not disputed."

The prejudicial effect of the details of defendant's prior criminal history clearly outweighed any probative value, and the State psychiatrist's opinion would have retained its evidentiary value without a detailed discussion of defendant's criminal past. Finally, the error was prejudicial because the properly admitted evidence was not so overwhelming on the issue of sanity that no fair-minded jury could have voted to acquit.

People v. Haywood, 250 Ill.App.3d 371, 621 N.E.2d 47 (1st Dist. 1993) At his trial for first-degree murder, defendant claimed to have shot the decedent in self-defense. Defendant testified that shortly before the shooting, the decedent attempted to rob him and struck him in the head with a gun because he had no money.

Defendant then joined several friends who were looking for a person who had just robbed another member of the group. As the men searched, the decedent ran from a gangway. Defendant fired one shot because he believed that the decedent was pulling a gun from his pocket. Defendant claimed that he yelled "Give up" before he fired.

Two other witnesses testified that the decedent did not have a weapon in his hands. One witness was unsure whether defendant yelled "Give it up," and the other denied telling police that defendant had done so. According to a police officer, the latter witness said that defendant had yelled "Give it up."

A bag containing .6 grams of cocaine was found near the body. The State introduced the cocaine as evidence of motive, theorizing that the decedent had taken the bag from defendant during the earlier robbery and that defendant intended to kill the "person who took his dope." The trial court admitted the cocaine but sustained defense objections to the State's closing argument, which repeatedly asserted the alleged motive.

The cocaine should not have been admitted because there was no evidence connecting it to defendant. To establish that the cocaine proved motive, the State was required to show that defendant once possessed it and had been robbed of it by the decedent. Although there was evidence that the decedent attempted to rob defendant, there was no evidence that defendant ever possessed the cocaine. Even if defendant did yell before he fired, a point on which the evidence conflicted, his statement "falls far short" of establishing that he had possessed the cocaine and that it had been stolen from him. The evidence was "simply too slim a thread" on which to base an argument on motive.

People v. Leaks, 179 Ill.App.3d 231, 534 N.E.2d 491 (1st Dist. 1989) An overbroad instruction regarding the limited use of other crimes evidence was harmless error. The instruction included the use of "identification," which was not in issue.

People v. Grabbe, 148 Ill.App.3d 678, 499 N.E.2d 499 (4th Dist 1986) Defendant was convicted of the murder of his wife. The wife disappeared in July 1981, and her body was never found. The only evidence that directly linked defendant to his wife's death came from a woman, McCalister, who was dating defendant at that time - she testified that she was present and saw defendant kill his wife and burn her body. Defendant testified and denied the killing.

Over objection, McCalister was allowed to testify that while defendant was burning his wife's body, he said he had previously killed three other people. In admitting this statement, the trial judge informed the jury that it was to be considered "solely on the issue of defendant's intent." However, the jury was later given IPI 3.14, which stated that the above evidence was "received solely on the issue of defendant's motive."

The above evidence was improperly admitted. "Defendant's admission of prior murders had no relevance to either his intent or motive in regard to the crime with which he was charged. The evidence as explained and limited by the instructions merely had the purpose of 'overpersuading' the jury that defendant was a very bad person."

People v. Smith, 122 Ill.App.3d 609, 461 N.E.2d 534 (3d Dist. 1984) At defendant's trial for an armed robbery at a tavern, the State introduced testimony of defendant's ex-wife connecting him to a prior armed robbery of another tavern. The testimony was improperly introduced because there was insufficient evidence presented to show that defendant committed the prior offense. Defendant was not identified at the time of the prior offense, he was not connected to the crime, and the description given by the tavern owner "differ[ed] greatly" from the description of defendant.

People v. Gugliotta, 81 Ill.App.3d 362, 401 N.E.2d 262 (2d Dist. 1980) It was improper, at defendant's trial for arson, for the State to introduce evidence of three other arsons allegedly committed by defendant. The State failed to show that the other fires were of an incendiary origin or that they had been committed by defendant.

Evidence of other crimes cannot be admitted for any purpose until it is shown that such crimes actually took place and that defendant committed them or participated in their commission. See also, **People v. Miller**, 55 Ill.App.3d 421, 370 N.E.2d 1155 (1st Dist. 1977).

People v. Connors, 82 Ill.App.3d 312, 402 N.E.2d 773 (1st Dist. 1980) When evidence of another crime is introduced, the jury should be instructed as to the purpose for which it may be used.

People v. Walters, 69 Ill.App.3d 906, 387 N.E.2d 1230 (1st Dist. 1979) Before evidence of another crime may be introduced, it must be shown that the crime actually occurred and that defendant committed it or participated in its commission, though such proof need not be beyond a reasonable doubt. See also, **In re L.F.**, 119 Ill.App.3d 406, 456 N.E.2d 646 (2d Dist. 1983).

§19-24(b)
Examples

§19-24(b)(1)
Generally

Illinois Supreme Court
People v. Chapman, 2012 IL 111896 725 ILCS 5/115-20 provides that:

> [e]vidence of a prior conviction of a defendant for domestic battery, aggravated battery committed against a family or household member . . . stalking, aggravated stalking, or violation of an order of protection is admissible in a later criminal prosecution *for any of these types of offenses* when the victim is the same person who was the victim of the previous offense that resulted in conviction of the defendant. (Emphasis added).

Section 115-20 abrogates the common law rule against propensity evidence, provided that the evidence is relevant and its probative value is not substantially outweighed by the risk of undue prejudice.

People v. Dabbs, 239 Ill. 2d 277, 940 N.E.2d 1088 (2010) Defendant argued that at his trial for the first degree murder of his girlfriend, the State should not have been allowed to introduce evidence that defendant had a prior conviction for domestic battery against the decedent. Defendant argued that §115-20 does not authorize admission of the prior conviction in a first degree murder trial, because the phrase "later criminal prosecution for any of these types of offenses" authorizes other crimes evidence only in subsequent prosecutions for the five offenses specified in the statute. Defendant argued that because first degree murder is not specifically listed, §115-20 does not authorize the use of propensity evidence in first degree murder prosecutions.

The court rejected the defendant's argument, finding that the phrase "any of these types of offenses" was intended to include prosecutions for all offenses which share the same general characteristics as the specified offenses. Because murder of a household member can be of the same "kind, class or group" as the offenses enumerated in §115-20, and the charge alleged that defendant murdered his girlfriend in the couple's residence, the charge involved the functional equivalent of domestic battery or aggravated battery committed against a family or household member. Thus, §115-20 authorizes admission of the prior conviction so long as the probative value is not outweighed by the prejudicial effect.

The court concluded that evidence of defendant's prior domestic battery conviction was more probative than prejudicial where the prior offense was committed against the same victim, occurred less than 18 months before the alleged murder, and was relevant to the

State's theory of the case because it showed defendant's intent and inclination to harm the decedent.

People v. Adkins, 239 Ill.2d 1, 940 N.E.2d 11 (2010) Other-crime evidence may be admitted as part of a continuing narrative if it is part of the circumstances attending the entire transaction and does not involve separate, distinct, and disconnected crimes. The continuing-narrative exception is inapplicable even where offenses occur in close proximity to each other, if the offenses are distinct and undertaken for different reasons at a different place and at a separate time.

Defendant's statement admitting to the commission of other burglaries and describing the technique he used was not admissible under the continuing-narrative exception to the use of other-crime evidence. But this evidence was properly admitted for a purpose other than to prove defendant's propensity to commit burglary. Defendant's statement supported his theory of defense that he committed the burglary but left before any murder, by showing that he had developed a technique to avoid detection and contact with residents of the homes he burglarized.

People v. Carlson, 92 Ill.2d 440, 442 N.E.2d 504 (1982) Defendant was convicted of delivery of a controlled substance to an undercover officer at a bowling alley. Defendant presented an alibi defense in which five witnesses testified that he was at a party at the time of the alleged delivery.

Over objection, the State was allowed to ask a defense witness whether defendant smoked marijuana at the party. The witness answered yes. He was again asked the same question, and answered probably. And, finally upon being asked again, the witness said "no, not really."

The questioning about defendant's use of marijuana constituted evidence of a collateral crime and was improperly admitted because it was not relevant to show defendant's knowledge, intent, motive, design, plan or identification. However, the error was held to be harmless.

Illinois Appellate Court

People v. Adams, 2023 IL App (2d) 220061 At defendant's trial for aggravated criminal sexual abuse against A.S. for incidents occurring at defendant's home, the trial court allowed the State to introduce other-crimes evidence including testimony by the complaining witness, A.S., that defendant had grabbed her midsection, butt, vagina, and breasts on numerous instances while they were in her family's swimming pool during church gatherings at her house (the "swimming pool evidence"), and evidence regarding defendant's guilty plea to attempt criminal sexual abuse against another individual, E.O. ("the plea evidence"). On appeal, defendant argued that the court failed to make a meaningful assessment before admitting the swimming pool evidence and that the plea evidence was not admissible under 725 ILCS 5/115-7.3 because it was not a listed offense.

Regarding the swimming pool evidence, the appellate court agreed that the circuit court failed to conduct a meaningful assessment to determine its admissibility under Section 115-7.3. Where a defendant is charged with aggravated criminal sexual abuse, evidence of defendant's commission of a listed offense is admissible under Section 115-7.3 for "any matter to which it is relevant," including defendant's propensity to commit the charged offense. But, before the evidence can be admitted, Section 115-7.3 also requires that the court weigh its probative value against its prejudicial effect.

Here, the court did not conduct any sort of balancing test regarding the evidence. The judge's statement that he understood "defendant's concern" regarding the swimming pool evidence was not a consideration of the prejudicial effect of the evidence. Instead, it was a reference to defendant's inability to rebut those claims without foregoing his right against self-incrimination because criminal charges based on the swimming pool evidence were pending separately in another county.

The error was harmless, though, where the court could have reasonable found that the probative value of the evidence was not substantially outweighed by its prejudicial effect. Both the charged conduct and the swimming pool evidence involved A.S., and both involved allegations of touching over the clothing. Additionally, only about a year separated the incidents. While the swimming pool evidence was certainly prejudicial, it fit squarely within the parameters of Section 115-7.3, and its admission was not an abuse of discretion. The dissent would have found the error reversible, disagreeing that the swimming pool evidence and the charged conduct were sufficiently similar or proximate in time.

The court agreed with defendant that the plea evidence was improperly admitted because attempt criminal sexual abuse is not a listed offense under Section 115-7.3. Additionally, it was not admissible to show defendant's intent, motive, or absence of mistake where the State was not able to produce E.O. to testify at trial but rather merely admitted the charging instrument and plea. The conduct involving E.O. occurred 18 years after the charged conduct. And, without E.O.'s testimony, there was no evidence from which the trier of fact could assess whether the prior incident was sufficiently similar to the charged conduct as to demonstrate motive, intent, or absence of mistake. Thus, the probative value of the plea evidence was so low as to be outweighed by its prejudicial effect under Illinois Rule of Evidence 404(b), and it should not have been admitted. But, the court concluded that the error was harmless where the trial judge specifically found A.S. credible, and where her testimony was corroborated by her father's observations and by the swimming pool evidence. There was no reasonable probability that the outcome of defendant's trial would have been different had the plea evidence been excluded.

People v. Cummings, 2023 IL App (1st) 220520 A police officer's testimony that the defendant was identified as the offender in the charged criminal sexual assault based on a "DNA association with another case" where defendant was "the named offender" was not improper other crimes evidence. The officer's testimony explained the investigatory process and was appropriately narrow. It was not offered to establish defendant's propensity to commit crime and not unduly prejudicial.

Further, to the extent it was ultimately revealed that the other case also involved a criminal sexual assault, that testimony came in response to questioning by the *pro se* defendant during his cross-examination of the officer. And, on redirect, the State elicited additional evidence about how defendant's DNA profile was developed and entered into CODIS in the prior sexual assault investigation, which was proper once defendant had opened the door to the subject.

People v. McGee, 2015 IL App (1st) 122000 Defendant was convicted of stalking a CTA employee based on two incidents where he approached her, banged on the windows of her kiosk, and verbally threatened her. The State, over defendant's objection, was also allowed to introduce evidence of a physical altercation between defendant and the CTA employee's husband which occurred two hours after the second incident, when defendant returned to the train station. During that altercation, defendant stabbed the husband with a box cutter. The police later recovered a box cutter from defendant's backpack.

The court held that the admission of altercation between defendant and the husband was improper other crimes evidence and reversible error. The court rejected the State's argument that evidence was admissible as a continuing narrative of the charged offense and to show defendant's intent to harm the CTA employee. Here, defendant's altercation with the husband was a distinct event that was not part of a continuing narrative. It occurred two hours after his last contact with the CTA employee and did not involve any contact with her. Instead, when defendant returned to the station, the husband approached him and the two began fighting. The incident was thus inadmissible as a continuing narrative.

The incident was also inadmissible to establish defendant's intent to harm the CTA employee since it showed that he arrived at the station with the box cutter. Even though evidence of the box cutter may have been admissible, the State could have done this by simply showing that the box cutter was found in defendant's backpack at the station. It had no need to introduce evidence of the altercation to prove the existence of the box cutter.

The court reversed defendant's conviction and remanded for a new trial.

People v. Smith, 2015 IL App (4th) 130205 At defendant's trial for predatory criminal sexual assault of a child, aggravated criminal sexual abuse, and sexual exploitation of a child, the trial court found that §115-7.3 authorized the admission of evidence of similar conduct which defendant committed against other children some 12 to 18 years earlier. The Appellate Court found that the trial judge did not abuse its discretion by admitting the evidence, noting that the offenses were "remarkably similar" to the charges in this case and that the mere passage of time does not necessarily make the admission of prior offenses unduly prejudicial.

The court also noted that the trial court acted to limit the prejudice of the prior crime evidence when it barred testimony concerning prior conduct that was not similar to the allegations in the present case and twice read limiting instructions that were repeated by the State in closing argument. In addition, on cross-examination defense counsel was able to establish that no charges had been filed concerning the prior offenses. Finally, the State did not unduly emphasize the prior crimes evidence in closing argument.

Defendant's convictions were affirmed.

People v. Baldwin, 2014 IL App (1st) 121725 Defendant argued that at his trial for aggravated criminal sexual assault, the trial court erred by admitting evidence of a prior aggravated criminal sexual assault where defendant was acquitted on one count of aggravated criminal sexual assault concerning the earlier offense and the jury could not reach a verdict on the other count.

The court held that the trial judge did not err by admitting the prior offense. The plain language of the statute does not base the admissibility of the other crimes evidence on the existence of a conviction, and does not preclude admission of such evidence where the defendant was acquitted of the other offense. Furthermore, the fact that defendant was acquitted did not necessarily mean that the evidence was inadmissible, because the State's inability to prove every element of its case beyond a reasonable doubt did not mean that it could not meet the standard for admissibility of other crimes evidence, which requires only that there be more than a mere suspicion that the other crime was committed by the defendant.

People v. Johnson, 2014 IL App (2d) 121004 Before evidence may be admitted under §115-7.3(b), the trial court must weigh the probative value of the evidence against the undue prejudice it might cause. The admissibility of the evidence rests within the discretion of the trial court, whose decision will not be disturbed absent an abuse of discretion.

Here, the trial court erred by admitting the other crimes for motive, lack of mistake, and *modus operandi*. Because defendant maintained that the sexual intercourse was consensual, neither *modus operandi* nor lack of mistake was at issue. Furthermore, there was nothing in the record to suggest that the other crimes created a motive to commit the instant offense, especially where two of the other crimes occurred after the charged crime and the other occurred several years earlier.

The other crimes evidence was relevant to show defendant's intent and propensity to commit sex offenses, and was therefore properly admitted. The court rejected the State's argument that under **People v. Perez**, 2012 IL App (2d) 100865, evidence that is admitted pursuant to §115-7.3(b) is admitted without limitation concerning its use. The court concluded that because §115-7.3 authorizes the use of other crimes evidence only if relevant and where the probative value is not outweighed by the prejudicial effect, evidence is admissible only on matters that are relevant under the facts of the case.

The court also rejected defendant's argument that reversible error occurred when the jury was instructed that it could consider the other crimes evidence not only for propensity and intent but also for motive, lack of mistake, and *modus operandi*. First, the trial court was not required to give any limiting instruction. Second, precedent holds that where a limiting instruction permits a jury to consider other crimes evidence for a number of reasons, and one of those reasons is determined on appeal to be improper, the conviction must be affirmed despite the overly broad instruction.

Defendant's convictions for first degree murder and aggravated criminal sexual assault were affirmed.

People v. Moore, 2012 IL App (1st) 100857 A videotape of a police interrogation of defendant contained references to: (1) a prior incident of domestic violence in which defendant punched a woman and broke her jaw after finding her with another man; defendant apparently pled guilty to this charge; (2) defendant's prior history of robberies; and (3) defendant's prior history as a drug dealer and membership in a street gang. This other-crime evidence was irrelevant and unfairly prejudicial. Had defense counsel objected to this evidence, it would have been excluded.

People v. Johnson, 2012 IL App (1st) 091730 Other-crimes evidence is generally inadmissible where its sole relevance is to establish defendant's propensity to commit crimes.

In a first-degree-murder prosecution, eliciting evidence on cross-examination of defense witnesses that they were aware that defendant was incarcerated on drug charges had no admissible bearing on his guilt or innocence other than to promote jury bias.

People v. Chambers, 2011 IL App (3d) 090949 The Appellate Court rejected defendant's argument that §115-20 permits admission of only the fact of the prior conviction, and does not authorize evidence of the circumstances of the prior offense. The court found that the legislature intended to allow evidence other than the mere fact of conviction, because it included witness statements within the evidence which the prosecutor was required to disclose under §115-20(d). Had the legislature intended that only the fact of conviction be admitted, it would not have been necessary to require that such statements be disclosed.

The court also noted that §115-20(e) provides that the State may introduce evidence of the prior conviction by showing "specific instances of conduct." By using such language, the legislature contemplated that more than the mere fact of a prior conviction would be admitted.

The court also noted that §115-7.4, which was not cited by either party to the appeal, sets forth a second exception statutory exception for the admission of propensity evidence in domestic violence cases. The court concluded that §115-7.4 would have justified admission of the propensity evidence even had §115-20 been inapplicable.

The court rejected defendant's argument that the trial court abused its discretion by admitting cumulative and unduly prejudicial details concerning the prior crime, resulting in a "trial within a trial" concerning the prior offense. The court acknowledged that three witnesses testified concerning the prior conviction, but found no indication that the prior offense became the focus of the trial.

People v. Everhart, 405 Ill.App.3d 687, 939 N.E.2d 82 (1st Dist. 2010) Evidence of a prior sex offense was properly admitted on the issue of defendant's propensity to commit sex crimes. First, the prior offense was not too remote to be admitted although it occurred nearly 11 years before the current offense. There is no bright line rule governing whether prior convictions are too old to be admitted under § 115-7.3; instead, the age of the prior conviction is one factor to be considered in evaluating probative value.

The court noted that when defendant's in-custody time was deducted, the lapse between the offenses was less than six years. "We do not believe the gap of six years renders the prior offense too remote as to be an abuse of discretion on this factor alone."

Furthermore, there was sufficient similarity between the offenses to justify admission of the prior offense to show propensity. Where evidence is offered for some purpose other than *modus operandi*, only general areas of similarity are required to justify admission. Here, the offenses were sufficiently similar because both attacks occurred after midnight while the complainants were alone (in a parking lot or unlocking an apartment door), both women were moved to secluded locations, both women were told to remove the same items of clothing, and both women were positioned to face away from the defendant and threatened with what each believed to be a firearm. Furthermore, the perpetrator spoke to both women during the assault, tried to prevent both women from seeing his face, and took the purses of both women after the offense.

The court rejected the argument that significant differences between the cases rendered them insufficiently similar to be probative. For example, although the ages of the complainants differed by 15 years, the court noted that each complainant was approximately the same age as the defendant when the offenses occurred. Similarly, the fact that the attacks differed in length was insignificant because neither complainant knew exactly how long the assault had lasted. Finally, the court concluded that the differences in the type of penetration in each case did not negate the factual similarities between the crimes.

The court rejected the argument that § 115-7.3 violates due process. In **People v. Donoho**, 204 Ill.2d 159, 788 N.E.2d 707 (2003), the Illinois Supreme Court upheld § 115-7.3 when challenged on equal protection grounds, and implicitly held that the statute also satisfies due process. In addition, § 115-7.3 satisfies due process because the trial court retains discretion to weigh probative value against prejudicial effect and deny admission of prejudicial evidence.

Defendant's conviction for aggravated criminal assault was affirmed.

People v. Johnson, 406 Ill.App.3d 805, 941 N.E.2d 242 (1st Dist. 2010) For two reasons, the trial court erred at a trial for aggravated criminal sexual assault when it admitted evidence that 18 months after the charged offense, defendant and another man sexually assaulted a different complainant. First, the trial court considered only whether the other crimes evidence was probative, and did not weigh the probative value against any undue

prejudice. Second, there were substantial dissimilarities between the offenses. In the charged offense, the complainant was accosted by a single man as she walked past an alley. In the uncharged offense, the complainant was forced into a car and assaulted by two men who blew cocaine in her face and gave her alcohol. In addition, the type of penetration differed between the cases.

In view of the "significant dissimilarities" between the offenses, the court concluded that the probative value of the uncharged offense was substantially outweighed by the prejudicial effect. Thus, the trial court abused its discretion by admitting the evidence.

However, the error was harmless because it did not likely influence the jury's verdict. The court concluded that a rational trier of fact could easily have convicted defendant based on the complainant's testimony identifying him, the properly admitted medical evidence, and an expert opinion based on DNA analysis.

People v. Raymond, 404 Ill.App.3d 1028, 938 N.E.2d 131 (1st Dist. 2010) Other-crime evidence may be admitted to show defendant's propensity to commit predatory criminal sexual assault of a child pursuant to 725 ILCS 5/115-7.3. Unlike evidence offered to prove *modus operandi* or common scheme or design, the level of similarity between the charged and uncharged offenses need not be sufficient to earmark both as the handiwork of a single offender; mere general areas of similarity are enough.

The court concluded that the following similarities were sufficient to uphold admission of the other crime evidence, even though some dissimilarities did exist between the offenses and some of the similarities were generic: the offenses occurred within four years of each other; both victims were female, in the same age range of 12-14; defendant was significantly older (19 and 23); the encounters were in places where defendant was not permitted to be, but were places the victims were familiar with; and the encounters began as consensual and involved vaginal penetration.

People v. Smith, 406 Ill.App.3d 747, 941 N.E.2d 419 (3d Dist. 2010) Defendant was charged with fondling his granddaughter's vagina outside of her clothing in 2005. The State sought to admit evidence that defendant had committed: (1) forced acts of sexual intercourse with his sisters in the 1960s and 1970s; (2) acts of digital penetration and rubbing of the vaginal area under the clothing of his daughters in the 1970s and 1980s; and (3) acts of touching the vaginal area of another granddaughter outside of her clothing five years before the charged offense.

The court did not abuse its discretion in excluding evidence of the sex offenses committed against the defendant's sisters and daughters. Evidence of those offenses was not only stale due to their extreme remoteness in time, they constituted evidence of uncharged and unproven allegations of sexual offenses dissimilar to and more heinous than the charged offense. The court did allow the State to admit evidence of the offense committed against the other granddaughter, which was most similar to and therefore most probative of the charged offense.

The sheer volume of other-crime evidence proffered by the State also created a risk that evidence would become a focal point of the trial and lead the jury to convict defendant based on those crimes alone, rather than the charged offense. Contrary to **People v. Watson**, 386 Ill.App.3d 598, 900 N.E.2d 267 (2d Dist. 2008), this concern is not inconsequential where the other-crime evidence is offered to prove propensity. The court must still take care to ensure that it admits only so much evidence as is reasonably necessary to prove propensity.

The Appellate Court affirmed the trial court's order excluding evidence of the offenses committed against defendant's sisters and daughters.

People v. Strawbridge, 404 Ill.App.3d 460, 935 N.E.2d 1104 (2d Dist. 2010) Other crimes evidence is not admissible to bolster the credibility of a State's witness. The trial court erred by allowing the State to introduce pornographic images recovered from defendant's computer in order to corroborate the complainant's testimony that she had been shown those pictures.

The court rejected the argument that the error satisfied the "fundamental error" prong of the plain error rule, however. Because the improper admission of other crimes evidence is subject to harmless error analysis, it is not of such a fundamental nature as to deny a fair trial *per se*. The court also found that the evidence did not deny a fair trial - possession of deviate pornographic images was not "particularly prejudicial" where such evidence was "less reprehensible" than predatory criminal sexual assault of a child and aggravated stalking, the crimes for which the defendant was on trial.

People v. Cardamone, 381 Ill.App.3d 462, 885 N.E.2d 1159 (2d Dist. 2008) 725 ILCS 5/115-7.3 provides that when a defendant is accused of certain sexual offenses against children, evidence of similar offenses are admissible for any relevant purpose, provided that the probative value of the evidence is not outweighed by the prejudicial effect.

Such evidence was relevant in this case to show defendant's propensity to commit the charged offenses, but the prejudicial effect of the evidence far outweighed the probative value. Defendant, a gymnastics coach, was convicted of nine counts of aggravated criminal sexual abuse against seven girls. However, the seven complainants testified not only to the 26 acts that were charged, but that defendant also committed between 158 and 257 uncharged offenses. In addition, the trial court admitted evidence of additional uncharged acts committed against persons other than the complainants. Because no reasonable person could have believed that the probative value of such evidence was less than the prejudicial effect, the trial court abused its discretion by admitting the evidence.

People v. Holmes, 383 Ill.App.3d 506, 890 N.E.2d 1045 (1st Dist. 2008) Under common law, other crimes evidence was generally prohibited to show one's propensity to commit the charged crime. By enacting 725 ILCS 5/115-7.3, which in sex offense prosecutions allows other crimes evidence for any purpose for which it is relevant, the legislature intended to modify the traditional rule and permit propensity evidence in certain circumstances. In determining whether propensity evidence is admissible under §115-7.3, the court must weigh probative value and prejudicial effect in light of several statutory factors, including: (1) the proximity in time between the charged and uncharged offenses; (2) the degree of factual similarity between the offenses; and (3) any other relevant facts and circumstances. The trial court's decision to admit or deny propensity evidence is reviewed under the abuse of discretion standard.

The trial court abused its discretion by excluding a prior sexual battery conviction. Although nine years elapsed between the prior and charged offenses, defendant was incarcerated for five of those years. In addition, the sexual battery conviction had a number of similarities to the charges for which defendant was being tried, including that both victims were women who had relationships with defendant but refused to continue those relationships, both offenses occurred in broad daylight, both women were assaulted at knife point. In addition, defendant punched both victims to immobilize them and brought both to his parents' home during or after the attack. Other similarities included that defendant claimed both women consented to having sex and medical documentation supported the claims of physical assaults and sexual trauma.

In determining that the probative value of the nine-year-old conviction was greater than the prejudice, the credibility issue raised by the complainant's response to the supplemental discovery motion was an appropriate factor to consider. Propensity evidence is disfavored not because it is irrelevant, but because it is overly persuasive to the point of enticing a jury to convict only because defendant is a bad person who deserves punishment. The existence of motive or bias on the part of the complainant reduces the likelihood that defendant would be convicted merely because of the propensity evidence, and therefore makes propensity evidence less prejudicial.

Also, a conviction for attempted forcible rape which occurred seven years before the offense for which defendant was on trial was properly excluded by the trial court. Because the details of the assaults were not similar and the conviction was entered as part of a plea negotiation involving other charges, "admitting this conviction would be more prejudicial than probative." See also, **People v. Taylor**, 383 Ill.App.3d 591, 890 N.E.2d 1108 (1st Dist. 2008) (trial court abused its discretion by excluding evidence of prior sexual offenses under §115-7.3; the offenses occurred only six years apart and had several similarities).

People v. McGee, 286 Ill.App.3d 786, 676 N.E.2d 1341 (1st Dist. 1997) Defendant testified on direct examination that after he was shot in the face several years earlier, he began to carry a gun. The prosecutor asked whether defendant had been a convicted felon at the time and whether he realized that he committed a felony every time he carried a gun outside his home. The prosecutor also asked how long defendant had carried the gun.

The prosecutor's questioning was prejudicial error. "[E]vidence that the defendant might have been committing a weapons felony every day for more than two years bore no relevance to the murder charge being tried . . ., [and] the only purpose of the evidence was to unfairly prejudice the defendant in the minds of the jurors."

People v. Nunley, 271 Ill.App.3d 427, 648 N.E.2d 1015 (1st Dist. 1995) Defendant was convicted, in a jury trial, of the murder and armed robbery of a drug dealer. At trial the State introduced testimony that defendant had confessed to the offenses some 16 months after they happened, while he was in custody on unrelated charges of stabbing his mother and killing her dog.

Two police officers and an assistant State's Attorney testified that defendant said he attacked his mother and the dog because they were possessed by Satan. Defendant said he felt better because he had confessed, and one of the officers asked whether defendant had committed any other crimes. Defendant then confessed to the murder and armed robbery charged here.

The trial judge erred by admitting evidence of the unrelated crimes against defendant's mother and her dog. Although some evidence of these offenses would have been admissible to show that defendant's confession was voluntary, the "detail and repetitive manner" with which the evidence was presented "greatly exceeded" its relevance and "subjected defendant to a mini-trial over conduct far more grotesque than that for which he was on trial."

People v. Denny, 241 Ill.App.3d 345, 608 N.E.2d 1313 (4th Dist. 1993) Defendant was convicted of aggravated criminal sexual assault and home invasion after his former girlfriend testified that he hid in her closet and forced her to have intercourse at knifepoint. Over defense objection, the trial court admitted evidence that during an altercation eight months earlier, defendant had threatened the complainant with the same knife.

The trial court erred by admitting the prior offense. The only issue in the case was consent, and the prior assault had no possible relevance to that question. The prior assault was not relevant to modus operandi (no issue of identity was presented and the incidents were not sufficiently similar to justify the inference that the same person committed both), common design (the offense was not part of a larger criminal scheme), intent (defendant's intent to be in the home and engage in intercourse was not disputed), or relationship and familiarity (the complainant and defendant had dated for eight years and lived together for four years, and there was no need to further clarify their relationship). The jury was likely to consider the evidence as showing criminal propensity, especially since the trial judge failed to give any limiting instructions.

People v. Mikyska, 179 Ill.App.3d 795, 534 N.E.2d 1348 (2d Dist. 1989) At defendant's trial for reckless homicide, it was reversible error for the State to introduce evidence that defendant had used illegal drugs and smoked marijuana the night before the accident. This evidence was not relevant to whether defendant was under the influence of drugs at the time of the accident; furthermore, the evidence was "highly prejudicial" because it "created an image of defendant as a bad person."

People v. Paull, 176 Ill.App.3d 960, 531 N.E.2d 1008 (1st Dist. 1988) At defendant's trial for aggravated incest, the complainant admitted that she was a drug addict. The State then introduced evidence that defendant sold drugs from his home.

Defendant's alleged drug sales were not relevant, and were not made relevant by the admission of evidence that complainant was a narcotics addict. The other crimes evidence "served only to suggest that defendant was a criminal, a poor parent, and the appropriate person to blame for complainant's addiction. Since such suggestion is improper in a criminal trial, the evidence should not have been admitted."

People v. Brunning, 95 Ill.App.3d 673, 420 N.E.2d 587 (1st Dist. 1981) Where defendant was charged with rape while using a gun, the State erred by introducing a possession of weapon charge on which defendant had been acquitted. The testimony was "not relevant to establish motive, common design, identity, intent, knowledge or a fact material to an issue on trial," and the combined effect of the cross-examination and rebuttal testimony "amounted to relitigating the . . . weapon possession charge, despite the fact that he had already been acquitted thereof." See also, **People v. Butler**, 31 Ill.App.3d 78, 334 N.E.2d 448 (2d Dist. 1975) (permitting extensive inquiry into details of prior crime was error even where limiting instruction was given and jury was informed that defendant was found not guilty of the prior crime).

People v. Senez, 80 Ill.App.3d 1021, 400 N.E.2d 928 (2d Dist. 1980) At defendant's trial for bribery, the State improperly introduced evidence that defendant had previously been involved in stealing a car. Such evidence was not probative in regard to motive, intent, identity, absence of mistake or modus operandi. Additionally, it related to conduct "long before the crime charged in this case."

People v. Hughes, 51 Ill.App.3d 985, 367 N.E.2d 485 (3d Dist. 1977) At defendant's aggravated battery trial, it was error for the State to introduce a statement by defendant that he had been involved in a similar shooting incident in another state, since it could only suggest to the jury that defendant had a propensity to commit such offenses.

People v. McKee, 52 Ill.App.3d 689, 367 N.E.2d 1000 (2d Dist. 1977) At a bench trial, the court committed prejudicial error by considering evidence of an alleged public indecency offense that occurred the day before the indecent liberties incident for which defendant was being tried.

People v. Osborn, 53 Ill.App.3d 312, 368 N.E.2d 608 (1st Dist. 1977) The State was properly allowed to introduce testimony concerning a prior attempt rape committed by defendant, though the charges had been dismissed after a preliminary hearing.

People v. Bain, 10 Ill.App.3d 909, 295 N.E.2d 295 (5th Dist. 1973) It was reversible error to bring out that defendant had previously pleaded guilty to the crime for which he was on trial. See also, **People v. Haycraft**, 76 Ill.App.2d 149, 221 N.E.2d 317 (2d Dist. 1966).

§19-24(b)(2)
***Modus Operandi*, Common Scheme or Design**

Illinois Supreme Court
People v. Robinson, 167 Ill.2d 53, 656 N.E.2d 1090 (1995) At defendant's trial for armed robbery and armed violence, the victim of the crimes, Lily Barber, testified that she was confronted by a masked man as she left the garage of her home. The man forced Barber back into the garage, and a struggle ensued. Barber pulled the mask from the attacker's face and saw his face from a distance of less than one foot.

Barber testified that the man brandished a switchblade knife, ordered her to lie down, and took her wallet. He then started to remove her clothing, but left when she said that she had a disease and that a neighbor would return home soon. Barber identified defendant as the man who had been in her garage and a knife recovered from defendant's car as the one used in the attack.

The State sought to introduce seven attacks against other women occurring within the previous 13 years. The trial court held that defendant would be unfairly prejudiced by evidence of seven other offenses, but allowed the State to present evidence of two crimes.

The State chose to present evidence concerning attacks on Eloise Law and Louise Collins. Law testified that a week after Barber was attacked, she was knocked down and had her purse stolen as she was leaving her garage. Law was unable to identify the assailant, but later in the day she went to the police station, where she identified credit cards that had been in her purse. The woman from whom the credit cards had been recovered told police that she had obtained the cards from defendant.

Louise Collins testified that 13 years before the attack on Barber, she was attacked in the vestibule of her building. As Collins entered her building, a man approached with a knife and demanded her purse. After surrendering her purse, Collins was forced to remove her clothing and lie on the floor. However, she escaped by stabbing the man with his own knife. Collins testified that she had identified defendant as her assailant during a lineup. She also identified defendant in open court.

The trial judge did not err by admitting the testimony of Law and Collins. Evidence of other crimes is generally inadmissible because it tends to "overpersuade" the jury that defendant is a bad person deserving punishment. However, such evidence is admissible where it is relevant for some purpose other than to show defendant's propensity to commit crimes. Before admitting such evidence, the trial court must weigh its prejudicial effect

against its probative value; the evidence must be excluded if the former substantially outweighs the latter.

There were sufficient similarities between the crimes to permit their use as modus operandi evidence. First, the case at bar and the offense against Law occurred within seven days of each other. In addition, both offenses occurred in the early evening in the same geographical area of Chicago. Furthermore, in both attacks the assailant covered his face, selected older woman as targets, and attacked the women as they exited their garages.

The attack on Collins was sufficiently similar to the offense against Barber to justify its admission; both attacks occurred during the early evening in the same geographical area of Chicago, the assailant surprised both victims as they were returning home, and the assailant used a knife and attempted sexual assaults in both cases.

Furthermore, the offense involving Collins was not too remote to be admitted, although it occurred 13 years earlier, where defendant had been incarcerated for all but two of the years between the crimes. Although the trial judge allowed the State to select which two crimes to present, he reserved the right to review those crimes to determine whether they were admissible.

People v. Evans, 125 Ill.2d 50, 530 N.E.2d 1360 (1988) At defendant's trial for murder and attempt rape, the State introduced evidence of other crimes by defendant.

The charged offenses took place in a housing complex elevator that was stopped between floors. The victim was found with her shirt and sweater pulled up and her pants and undergarments pulled down. She had been stabbed 22 times.

Two women were allowed to testify that they had been attacked, by a person identified as defendant, in the same housing complex within a week of the instant offenses. In both instances the perpetrator was armed with a knife, stopped the elevator between floors and attempted to rape the victims. In one instance the rape was successful; in the other, people outside the elevator started to scream, and the man restarted the elevator and departed. In one instance the woman was beaten about the head, and in the other threats were made to "cut up" the victim.

The other crimes were substantially similar, even virtually identical, to the crimes on trial. "Based on the similarity of the scheme and design of the crimes, the evidence was relevant to the identification of the perpetrator [in the instant case] . . . [and] as to whether defendant possessed the necessary criminal intent."

The prejudicial effect of the other crimes evidence did not outweigh its probative value. The evidence was highly probative of defendant's intent, particularly with respect to the attempted rape charge, and any prejudicial effect was limited by a jury instruction that the other crimes evidence was to be considered for the limited purpose of defendant's identification, intent and design.

People v. Taylor, 101 Ill.2d 508, 463 N.E.2d 705 (1984) At defendant's trial for murder and armed robbery, the State was allowed to introduce evidence of prior offenses. Defendant contended that this evidence was improper due to the differences between the facts of those offenses with the crimes on trial (the prior offenses took place outside while the instant offenses occurred inside a building, in one prior offense defendant posed as a policeman, and in another defendant attempted to take a victim's car).

Other crimes need not be identical to be admissible. There were a number of "substantial similarities" between the prior crimes and the crimes on trial: they all occurred within a one-block area within a four-day period, each occurred in the early evening hours and involved what appeared to be the same gun, the perpetrator searched each victim, and

defendant was identified in each case. These similarities tended to establish defendant's possession of the murder weapon, his intent to commit an armed robbery, and his placement near the scene of the crime, and served to identify him as the murderer.

People v. McKibbins, 96 Ill.2d 176, 449 N.E.2d 821 (1983) When evidence of another crime is introduced to establish a common design or plan: "there must be a degree of identity between the facts of the crime charged and those of the other offense in which the defendant was involved. The reason, of course, is that the defendant's participation in the crime charged may be inferred from his involvement in the other offense. Thus, to avoid the general rule of nonadmissibility of evidence of other crimes, the two offenses must be so similar that evidence of one offense tends to prove the defendant guilty of the offense charged."

See also, **People v. Cruz**, 162 Ill.2d 314, 643 N.E.2d 636 (1994) (the "high degree of similarity" requirement is not intended to avoid prejudicing defendant; instead, the basis for the modus operandi exception is that a pattern of criminal behavior is "so distinctive that separate crimes are recognized as the handiwork on the same wrongdoer").

People v. Tate, 87 Ill.2d 134, 429 N.E.2d 470 (1981) For a separate offense to be admissible as proof of modus operandi, a "strong and persuasive showing of similarity" must be made. Such a showing was not made where the similarities between the offenses were not distinctive, but were "standard shoplifting techniques" (i.e., putting meat inside one's clothes and grabbing for a gun during a struggle). Since there were no distinctive features linking the two offenses, "such as using similar weapons, dressing the same, acting with the same number of people, or even a distinctive method of committing the offense," evidence that another person had committed a similar crime was not admissible. Compare, **People v. Cruz**, 162 Ill.2d 314, 643 N.E.2d 636 (1994) (in murder case, defendant should have been allowed to introduce evidence of a third party's confessions to other crimes as modus operandi evidence; other crimes evidence cannot be excluded on the basis of unfair prejudice where the defense seeks to introduce the evidence; in addition, there was a sufficiently "high degree of similarity" between the offenses); **People v. Phillips**, 127 Ill.2d 499, 538 N.E.2d 500 (1989) (absence of injury in one rape did not render offense so dissimilar to rape in which victim killed as to preclude admission).

People v. McDonald, 62 Ill.2d 448, 343 N.E.2d 489 (1975) At defendant's trial for burglary, it was proper for the State to present testimony of a subsequent burglary where the modus operandi were similar. The attacks upon both victims were committed in the early morning hours, the burglar in both cases gained entry by removing a window while standing on an overturned refuse basket, and in both cases the burglar wore gym shoes, khaki pants and gloves.

Illinois Appellate Court

People v. Moore, 2023 IL App (1st) 211421 The appellate court rejected defendant's argument that his prior robberies were not distinct enough to show *modus operandi*. In all of the robberies, as in the charged robbery, defendant entered a Family Dollar store on the south side of Chicago in the evening or near closing time, pretended to look for or purchase items, revealed a firearm to the clerk, demanded money, and, if the clerk did not quickly comply, became impatient and threatened harm. The fact that each robbery had some unique circumstances did not undermine the fact that all of the crimes shared a *modus operandi*.

People v. Jones, 2020 IL App (4th) 190909 In a prosecution for unlawful delivery of a controlled substance involving a single transaction, the trial court did not err in admitting evidence of defendant's various other drug transactions. The prosecution could admit such evidence for purposes of showing "intent" and "system of operation" under Rule 404(b).

Although defendant complained of a "mini-trial" on the other crimes evidence given that it took up more than half of the testimony, the Appellate Court held that undue prejudice from extensive other-crimes evidence arises when it is cumulative. Here, much of the testimony was non-cumulative and was aimed at establishing defendant's constructive possession of drugs. The trial court properly instructed the jury nine times during the presentation of other-crimes evidence, foreclosing any possibility of confusion as to the use of such evidence.

People v. Smith, 2019 IL App (4th) 160641 In a prosecution for threatening a public official based upon a voicemail message left on a judge's office phone, the trial court abused its discretion in allowing State to introduce evidence of two inmate request slips that defendant sent from the jail to the judge while awaiting trial. The State asserted that the slips were admissible on the questions of identity, intent, and state of mind. The slips contained multiple citations to bible verses and indicated a desire to see the judge prosecuted for corruption. Defendant's original voicemail message also stated that the judge was corrupt.

The Appellate Court held that identity was not really at issue where other evidence established that it was defendant who left the voicemail message, so the prejudicial impact of the inmate slips outweighed their probative value on the question of identity. Further, the slips were not indicative of state of mind or intent where they were written after defendant had been charged based on the voicemail message and did not demonstrate defendant's intent or state of mind when he left the voicemail message.

Admission of the inmate slips constituted first-prong plain error where the evidence on the question of intent was closely balanced. The voicemail message in question was ambiguous, and the erroneously admitted slips threatened to tip the scales against defendant.

People v. Johnson, 2014 IL App (2d) 121004 At a jury trial for first degree murder and aggravated criminal sexual assault, the trial court admitted evidence that defendant allegedly committed three other sexual assaults against three different persons. One of the separate offenses occurred 11 years before the charged offenses, and the other two occurred within a few months after the charged offenses. The trial court admitted the other crimes on the issues of propensity, intent, motive, lack of mistake, and *modus operandi*.

The Appellate Court agreed with defendant that the other crimes evidence was inadmissable for the asserted purposes, but found that it was properly admitted as propensity evidence.

Here, the trial court erred by admitting the other crimes for motive, lack of mistake, and *modus operandi*. Because defendant maintained that the sexual intercourse was consensual, neither *modus operandi* nor lack of mistake was at issue. Furthermore, there was nothing in the record to suggest that the other crimes created a motive to commit the instant offense, especially where two of the other crimes occurred after the charged crime and the other occurred several years earlier.

The court concluded, however, that the other crimes evidence was relevant to show defendant's intent and propensity to commit sex offenses, and was therefore properly admitted. The court rejected the State's argument that under **People v. Perez**, 2012 IL App (2d) 100865, evidence that is admitted pursuant to §115-7.3(b) is admitted without limitation

concerning its use. The court concluded that because §115-7.3 authorizes the use of other crimes evidence only if relevant and where the probative value is not outweighed by the prejudicial effect, evidence is admissible only on matters that are relevant under the facts of the case.

The court also rejected defendant's argument that reversible error occurred when the jury was instructed that it could consider the other crimes evidence not only for propensity and intent but also for motive, lack of mistake, and *modus operandi*. First, the trial court was not required to give any limiting instruction. Second, precedent holds that where a limiting instruction permits a jury to consider other crimes evidence for a number of reasons, and one of those reasons is determined on appeal to be improper, the conviction must be affirmed despite the overly broad instruction.

People v. Littleton, 2014 IL App (1st) 121950 At defendant's trial for robbery, the State presented other crimes evidence to prove *modus operandi.* As part of that evidence, the State presented testimony from two retired police officers recounting statements from nine people concerning offenses to which defendant entered guilty pleas several years earlier. The State contended that the statements were not hearsay because they were offered as proof of *modus operandi* rather than to prove the truth of the matters asserted. The Appellate Court rejected this argument and held that the testimony contained inadmissible hearsay.

An out-of-court statement is not hearsay if it is offered for some reason other than to prove the truth of the matter asserted. Thus, out-of-court statements concerning other crimes are not hearsay if offered to prove something other than that the crime occurred. For example, in **People v. Moss,** 205 Ill.2d 139, 792 N.E.2d 1217 (2001) and **People v. Lovejoy**, 235 Ill.2d 97, 919 N.E.2d 843 (2009), statements concerning alleged sexual assaults were properly admitted at murder trials not to show that the sexual assaults had occurred, but to show the defendants' motives to kill persons who could have been witnesses at trials for sexual assaults.

By contrast, statements about unrelated crimes are hearsay if offered to prove that in fact the other crimes occurred. The *modus operandi* exception to the rule against other crimes evidence allows admission of other crimes to prove the identity of a perpetrator, on the theory that if one crime is committed in a unique way it is likely that another crime committed in the same way was the work of the same person. A pattern which gives rise to an inference of the perpetrator's identity exists only if the statements about the other crimes are true. If the statements about the other crimes are not true, there is no unique pattern of crime that would support the *modus operandi* exception.

Thus, statements presented in support of the *modus operandi* exception are offered to prove the truth of the matter asserted - that the other crimes occurred in a particular fashion. Such statements constitute hearsay and are inadmissible unless a hearsay exception applies.

Noting that no Illinois court has recognized an exception to the hearsay rule for statements offered to prove *modus operandi*, the court declined to create such an exception.

However, the erroneous admission of hearsay in this case was clearly harmless where the improper evidence was not a significant factor in the conviction, the properly-admitted evidence was overwhelming, and the improper evidence was largely cumulative. Defendant's conviction was affirmed.

People v. Quintero, 394 Ill.App.3d 716, 915 N.E.2d 461 (3d Dist. 2009). At defendant's trial for murder, the trial judge erred by admitting, on the issue of identification, evidence of a second murder which had been committed some 20 months earlier. Because there was

nothing about the earlier offense which connected defendant to the charged offense, the evidence was not probative on identification.

The court found that the evidence was admissible, if at all, only to show *modus operandi* – that the offenses were so similar as to mark them as the handiwork of a single perpetrator. The court found there were insufficient similarities between the offenses to justify admission of the evidence to show *modus operandi*; the State's theory of the crime was similar to a scene from the movie "The Godfather," and was not a distinctive method of committing crimes which could be traced to a single criminal. The court stated that the differences between the two offenses "outweigh the unremarkable similarities. . . such that there was no demonstrated pattern of criminal behavior so distinctive that the separate crimes could be recognized as the handiwork of the defendant."

The improper admission of other crimes evidence may be harmless if the defendant is not prejudiced or denied a fair trial. The State has the burden of persuasion, and to establish harmlessness must show beyond a reasonable doubt that the result would have been the same without the error.

Here, the erroneous admission of other crimes evidence could not be deemed harmless. The evidence of guilt was not overwhelming, and the outcome of the trial depended largely on the credibility of a witness whose believability was suspect.

People v. Jackson, 331 Ill.App.3d 279, 771 N.E.2d 982 (1st Dist. 2002) Evidence of other crimes is admissible if relevant to prove modus operandi, provided the evidence is not more prejudicial than probative, offered to show mere propensity to commit crimes, or used to bolster the testimony of a prosecution witness. Modus operandi refers to a pattern of criminal behavior that is so distinct that separate offenses are recognized as the work of a single person. To establish modus operandi, crimes must share peculiar and distinctive features that are not shared by most offenses of the same type and which earmark the offenses as having been committed by the same person.

At defendant's trial for aggravated criminal sexual assault, evidence of sexual assaults was not sufficiently similar to the charged crime to be admitted as modus operandi. The complainants were assaulted at different times of day, several months apart, in different buildings, and in different parts of Chicago. Although both complainants were forced to engage in vaginal sex, only one was also forced to engage in acts of oral sex. The fact that both offenses took place in dirty, abandoned buildings did not identify the offenses as the work of a single person, as sexual assaults usually occur in isolated areas. In addition, a gun was used in one case while a knife was used in the other.

Furthermore, the perpetrators used entirely different approaches - one complainant was grabbed by a man who jumped out of the bushes, and was dragged to a nearby building; the other was approached by a man who asked if he could accompany her and was then forced into a car and driven to an abandoned building.

Modus operandi was not shown by the fact that the perpetrator of the first offense stole the complainant's Nautica coat, while the perpetrator of the second offense wore a Nautica coat. Because "Nautica apparel is readily available, common and sold throughout the city," it is not distinct or unusual.

The complainants shared no common characteristics except race and gender, and many of the similarities asserted by the State were common to all sexual assaults. Therefore, the evidence did not establish modus operandi. See also, **People v. Thigpen**, 306 Ill.App.3d 29, 713 N.E.2d 633 (1st Dist. 1999) (evidence did not show modus operandi where the second murder was not sufficiently similar to the crime charged to "earmark" both as the work of a single person; one shooting occurred at night at a crowded intersection while the other was a

daytime kidnapping followed by a shooting in a deserted area; the probative value of evidence was outweighed by its prejudicial effect concerning the existence of a common plan or scheme or identity, especially where extensive details about the uncharged crime, including photographs of victims, were admitted).

People v. Knight, 309 Ill.App.3d 224, 722 N.E.2d 331 (2d Dist. 1999) To be admissible as modus operandi evidence, the uncharged and charged crimes must share "peculiar and distinctive common features so as to earmark both crimes as the defendant's handiwork." The offense at issue (domestic battery) and defendant's threat six weeks later (that he would break the complainant's leg if she slept with one of his friends) did not share such "peculiar and distinctive" features.

People v. Howard, 303 Ill.App.3d 726, 708 N.E.2d 1212 (1st Dist. 1999) Two armed robberies were not sufficiently similar to qualify as *modus operandi* evidence. The fact that both victims were white was "hardly a unique feature of the crime," and the State presented no evidence that the victims were targeted because of their occupation or that the offender asked their professions.

There were also significant differences between the offenses - only one victim was asked for an ATM PIN number, in only one instance did the perpetrator escape in an automobile, and there was nothing unique about the location in which the crimes occurred. The fact that both victims were approached from behind is also not "particularly distinctive," as "armed robbers often attempt to surprise their victims." Displaying a weapon and demanding the victim's wallet are also not unique characteristics of this crime, but describe "the prototypical armed robbery." Finally, the fact that a common epithet was used to address each victim is insignificant as the "earmark" of a particular offender.

People v. Overton, 281 Ill.App.3d 209, 666 N.E.2d 753 (1st Dist. 1996) Defendant was charged with armed robbery of a gas station in McCook on December 10, 1990. Before trial, the defense filed a motion *in limine* to exclude evidence that on December 26, 1990, defendant was arrested in Countryside after he drove at a high speed from a gas station that had just been robbed.

The trial court ruled that the State could introduce evidence of the police pursuit and stop. In addition, the trial court allowed the defense to introduce evidence that defendant had been acquitted of the Countryside armed robbery. However, the judge refused to admit the facts concerning the armed robbery at the Countryside station.

During opening argument, the prosecutor referred to the fact that, on December 26, a radio dispatch was received regarding the Countryside armed robbery. A police officer then testified that at approximately 5:45 p.m. on December 26, 1990, he saw a white Pontiac drive erratically out of a gas station and run a red light. As the officer pursued the car, he received a dispatch that the vehicle and occupants were wanted for the armed robbery of the gas station. During the pursuit, the officer saw a metal object come out of the passenger's window, strike the pavement and cause a spark.

The officer also testified that defendant and the other two occupants of the vehicle were arrested. Other evidence showed that a .32 caliber handgun was found one-half mile from the scene of the arrest.

The radio dispatch concerning the Countryside armed robbery constituted improper evidence of other crimes. The evidence was not admissible to show modus operandi. Not only did the State fail to argue that theory at trial, but modus operandi testimony "must be tailored so that the jury is apprised only of the behavior and not the commission of a crime,

and the prosecutor may not indicate that such behavior constituted the commission of a crime." In addition, the circumstances of the Countryside armed robbery were not sufficiently similar to those surrounding the crime charged to permit admission as modus operandi evidence. Finally, defendant had been acquitted of the Countryside robbery. See also, **People v. Brunning**, 95 Ill.App.3d 673, 420 N.E.2d 587 (1st Dist. 1981) (State erroneously used charge on which defendant had been acquitted as other crimes evidence).

People v. Woltz, 228 Ill.App.3d 670, 592 N.E.2d 1182 (5th Dist. 1992) At defendant's trial for aggravated criminal sexual assault for allegedly committing an act of sexual penetration against V.J., evidence that defendant had also committed a sexual assault against J.S. was not admissible to show absence of mistake. The only act which defendant claimed had been accidental was touching the complainant's breast, while the charge involved penetration of the vagina. In addition, it is improper to admit acts of sexual misconduct with other children to show intent, guilty knowledge or lack of accident or mistake, because those facts are shown by the acts themselves. The evidence was not admissible to show common design or scheme, either, because there was no indication that either offense was part of a larger scheme.

People v. Jendras, 216 Ill.App.3d 149, 576 N.E.2d 229 (1st Dist. 1991) At defendant's trial for aggravated criminal sexual abuse, the State was permitted to introduce testimony from two brothers that defendant had sexually abused them nine to 15 years earlier.

This testimony was admissible to show modus operandi where all three victims were males in seventh or eighth grade, defendant was their teacher, all the victims went alone to defendant's apartment where they were given swimming trunks and invited to swim, the acts of touching and fondling were similar, and defendant stopped when the boys said they had to leave.

The court was concerned about the remoteness of the evidence. However, admission of other crimes evidence is within the discretion of the trial judge, and in general remoteness should go to the weight of the evidence rather than its admissibility.

People v. Diaz, 201 Ill.App.3d 830, 558 N.E.2d 1363 (1st Dist 1990) At defendant's trial for criminal sexual assault against his eight-year-old daughter, the State was properly allowed to present testimony of defendant's prior sexual conduct with the same daughter. The sexual conduct of defendant with his daughter disclosed "a pattern of sexual abuse" and was proper to show modus operandi, as well as the relationship of the parties, defendant's intent, defendant's design or course of conduct, and to corroborate the complainant's testimony. See also, **People v. Williams**, 202 Ill.App.3d 495, 559 N.E.2d 1158 (1st Dist. 1990).

People v. Clauson, 182 Ill.App.3d 268, 537 N.E.2d 1048 (1st Dist. 1989) At defendant's trial for criminal sexual abuse, the State was properly allowed to introduce testimony showing defendant engaged in similar acts, six months earlier, with another person. There were sufficient similar and distinctive features to qualify the offenses as modus operandi evidence: defendant drove a beige van with tinted windows, went to the same private drive on a dead-end street, and engaged in similar homosexual acts. See also, **People v. Williams**, 185 Ill.App.3d 840, 541 N.E.2d 1175 (1st Dist. 1989).

People v. Connolly, 186 Ill.App.3d 429, 542 N.E.2d 517 (4th Dist. 1989) At defendant's trial for burglary, the State was allowed to introduce evidence showing that three years earlier, defendant had committed two burglaries. Each of the burglaries, including the one on trial,

involved: (1) forced entries into a commercial establishment in the early morning hours, and (2) attempts to disable alarm systems.

The prior crimes were improperly introduced to prove modus operandi. "[W]e cannot say these characteristics were so unusual and distinctive as to be like a signature . . . [rather], those characteristics are common to a great number of burglaries."

People v. Maness, 184 Ill.App.3d 149, 539 N.E.2d 1368 (4th Dist. 1989) At defendant's trial for a sex offense against one daughter (T.M.), the State was properly allowed to introduce the testimony of another daughter (K.M.) regarding defendant's sexual abuse upon her as *modus operandi* evidence.

"Defendant first sexually abused his daughters at an extremely young age. The sexual abuse progressed from inappropriate fondling to incestuous intercourse. The defendant met the resistance of his daughters with actual and threatened physical violence. To discourage his daughters from reporting the sexual abuse, the defendant mentally played on their normal fear of family separation and parental strife. It therefore follows, given the degree of factual similarity between the crimes, the jury could reasonably infer the defendant had sexually abused T.M. from the sexual misconduct testimony of K.M. describing the 'method of work' of the defendant."

People v. Alford, 111 Ill.App.3d 741, 444 N.E.2d 576 (1st Dist. 1982) Defendant was convicted of aggravated battery following a bench trial. The complainant testified that as he was leaving a store defendant, who was across the street, fired a gun and wounded him in the arm and side. The complainant identified defendant a few days after the incident.

Over defense objection, the State presented evidence that defendant had been involved in a shooting one block away five days earlier. A witness testified that defendant was involved in an argument with another patron in a tavern, left the tavern, pulled a gun, and fired two shots through the tavern door.

Evidence of the prior shooting was improperly admitted. Neither "common scheme" nor "modus operandi" was applicable in this case. Common scheme or design "refers to a larger criminal scheme of which the crime charged is only a portion." Here, there was no evidence showing that the shooting incident on trial was part of a larger criminal scheme. Modus operandi refers to a "pattern of criminal behavior so distinctive that separate crimes are recognizable as the handiwork of the same wrong doer." To qualify as modus operandi evidence, "the State must show that the offenses were so nearly identical in method as to earmark them as the handiwork of the accused." The two shooting incidents were not identical; the prior shooting involved the firing of a gun following an argument, whereas the instant shooting involved no argument whatsoever. Thus, no proper purpose was served by evidence of the prior shooting. See also, **People v. Kimbrough**, 138 Ill.App.3d 481, 485 N.E.2d 1292 (1st Dist. 1985) (discussion of common scheme and modus operandi); **People v. Maness**, 184 Ill.App.3d 149, 539 N.E.2d 1368 (4th Dist. 1989) (same).

People v. Barbour, 106 Ill.App.3d 993, 436 N.E.2d 667 (1st Dist. 1982) Defendant was convicted of rape and deviate sexual assault. Defendant testified that an act of intercourse occurred but that it was with the complainant's consent.

Over objection, the State introduced the testimony of two women who alleged that defendant had previously raped them. No charges were filed in those cases. Defendant admitted intercourse with the two women but claimed that both consented.

The evidence concerning the other alleged rapes was erroneously admitted. The similarities between the prior incidents and the one on trial were insufficient to demonstrate modus operandi. In addition, even if modus operandi had been shown the evidence of the other alleged crimes was not probative of any issue in this case. The State contended that the other crimes help to establish the offender's identity; however, identity was not in issue since defendant admitted to the intercourse but claimed consent.

People v. Rodriquez, 107 Ill.App.3d 43, 437 N.E.2d 441 (2d Dist. 1982) At defendant's trial for the forgery of certain checks, the State, over objection, was allowed to introduce detailed testimony concerning defendant's alleged forgery of unrelated stolen checks.

The probative value of that evidence was outweighed by its prejudicial effect. Such evidence was "entirely unnecessary to prove the charged offenses" and "merely served to raise an inference as to the defendant's propensity to negotiate stolen checks."

People v. Roberts, 100 Ill.App.3d 469, 426 N.E.2d 1104 (1st Dist. 1981) Defendant, the president of a park district, was convicted of official misconduct for soliciting and accepting fees from a landscaping company in return for awarding contracts. The State introduced evidence concerning other alleged misconduct by defendant: the use of HUD funds to remodel park district offices, requiring the landscaping company to do work at defendant's home, holding a tax referendum to raise money to pay off contractors from whom defendant had received kickbacks, and the fact that defendant was thrown out of office.

Such evidence was not relevant to show the scheme employed by defendant to accomplish the crimes for which he was charged. The above acts were dissimilar to the crimes charged, and in regard to the HUD funds there was no evidence showing any improper use. The admission of this evidence was not cured by the general instruction to disregard other crimes or misconduct, and the evidence was prejudicial since it "may have had the effect of 'overpersuading the jury,' resulting in [defendant's] conviction because [the jurors] felt he was a 'bad person deserving punishment.'"

People v. Triplett, 99 Ill.App.3d 1077, 425 N.E.2d 1236 (1st Dist. 1981) Defendant was convicted of the armed robbery of a Clark service station and the murder of the station manager. The State was allowed to introduce evidence that defendant had committed another armed robbery at a different Clark service station about three months earlier, to show defendant's knowledge of Clark station procedures and common design or modus operandi.

The introduction of the prior crime was reversible error. The need to use this evidence to show defendant's knowledge of Clark station procedures was slight, since such knowledge was clearly established by other evidence (defendant admitted working at Clark stations and knowing their procedures, and the State's evidence showed that defendant managed at least one Clark station, had worked at three, and was familiar with their procedures). Furthermore, the evidence was improperly admitted to show common scheme or modus operandi because there were several dissimilarities between the crime.

People v. Connors, 82 Ill.App.3d 312, 402 N.E.2d 773 (1st Dist. 1980) At defendant's trial for armed robbery the court erred in allowing evidence of defendant's alleged commission of another armed robbery four hours earlier.

The other crime evidence was not admissible to prove *modus operandi*, since the similarities (i.e., both occurred at night near the victim's car, a gun was used, and the perpetrators stated "don't make me shoot you" and "if you move I'll shoot") were not so distinctive as to earmark each as the conduct of the same perpetrator.

There was no evidence to support the State's contention that the prior robbery was accomplished to facilitate the robbery on trial. The crimes were four hours apart, and there was no testimony that the car stolen in the prior robbery was used in the crime on trial.

People v. DiGiacomo, 71 Ill.App.3d 56, 388 N.E.2d 128 (2d Dist. 1979) Evidence of prior offense occurring one or two hours earlier, which was almost identical to charged offense, was properly admitted to show modus operandi. See also, **People v. McCambry**, 76 Ill.App.3d 314, 395 N.E.2d 129 (1st Dist. 1979).

People v. Sievers, 56 Ill.App.3d 880, 372 N.E.2d 705 (4th Dist. 1978) At defendant's trial for rape and armed robbery, the State was properly allowed to introduce testimony about other attacks by defendant where there were peculiar and distinctive features in all the incidents.

People v. Copeland, 66 Ill.App.3d 556, 384 N.E.2d 391 (1st Dist. 1978) At defendant's trial for armed robbery, the State was properly allowed to introduce testimony of defendant's commission of an almost identical crime less than a mile away and two hours later. See also, **People v. Sanders**, 103 Ill.App.3d 700, 431 N.E.2d 1145 (1st Dist. 1982).

People v. Cook, 53 Ill.App.3d 997, 369 N.E.2d 246 (1st Dist. 1977) At defendant's rape trial, testimony concerning the facts surrounding a prior rape committed by defendant was improperly admitted. The testimony had no relevancy or materiality since the two incidents did not have such similarities as to constitute modus operandi. Furthermore, the "obvious effect" of the testimony was to inflame the jury against defendant by making it aware of the prior conviction. Compare, **People v. Uzelac**, 179 Ill.App.3d 395, 534 N.E.2d 1250 (1st Dist. 1989) (evidence of prior attempt rape was proper where it had similar distinctive features as offense on trial).

People v. Baxter, 74 Ill.App.2d 437, 221 N.E.2d 16 (1st Dist. 1966) At trial for unlawful sale of narcotics, it was reversible error for informer to testify that he had bought narcotics from defendant every day for three months.

§19-24(b)(3)
Intent, Knowledge, Absence of Mistake

Illinois Supreme Court
People v. Chapman, 2012 IL 111896 Defendant argued that at his trial for the first degree murder of his girlfriend, the State should not have been allowed to introduce evidence that defendant had a prior conviction for domestic battery against the decedent. Defendant argued that §115-20 does not authorize admission of the prior conviction in a first degree murder trial, because the phrase "later criminal prosecution for any of these types of offenses" authorizes other crimes evidence only in subsequent prosecutions for the five offenses specified in the statute. Defendant argued that because first degree murder is not specifically listed, §115-20 does not authorize the use of propensity evidence in first degree murder prosecutions.

The court rejected the defendant's argument, finding that the phrase "any of these types of offenses" was intended to include prosecutions for all offenses which share the same general characteristics as the specified offenses. Because murder of a household member can

be of the same "kind, class or group" as the offenses enumerated in §115-20, and the charge alleged that defendant murdered his girlfriend in the couple's residence, the charge involved the functional equivalent of domestic battery or aggravated battery committed against a family or household member. Thus, §115-20 authorizes admission of the prior conviction so long as the probative value is not outweighed by the prejudicial effect.

The court concluded that evidence of defendant's prior domestic battery conviction was more probative than prejudicial where the prior offense was committed against the same victim, occurred less than 18 months before the alleged murder, and was relevant to the State's theory of the case because it showed defendant's intent and inclination to harm the decedent.

Defendant's conviction for first degree murder was affirmed.

People v. Heard, 187 Ill.2d 36, 718 N.E.2d 58 (1999) In a murder case, evidence of defendant's violent acts toward the decedent before her death was admissible to show defendant's motive and intent to harm the decedent and her new boyfriend. The evidence revealed defendant's "continuing hostility and animosity" toward the couple; in addition, defendant's theft of the complainant's clothes showed that "defendant's motive for the murders was his anger over the break-up of his relationship."

People v. Novak, 163 Ill.2d 93, 643 N.E.2d 762 (1994) Defendant, a baseball coach, was convicted of aggravated criminal sexual assault. The State contended that on several occasions defendant blindfolded one of his 10-year-old players, tied the youth's hands behind his back, and committed sexual offenses. The defense claimed that defendant merely placed the player's arms behind his back while helping him do various neck and shoulder exercises.

The court admitted evidence of other crimes on the issue of defendant's intent. Even where defendant presents an innocent construction of his conduct, crimes against other children are admissible if relevant for any proper purpose, so long as their probative value outweighs their prejudicial effect.

People v. Illgen, 145 Ill.2d 353, 583 N.E.2d 515 (1991) Where defendant was tried for first degree murder arising out of the shooting death of his wife, evidence of prior incidents in which defendant had abused the decedent was properly admitted to show intent and motive. Such evidence tended to negate the likelihood that the shooting was accidental and showed that defendant and the decedent had an antagonistic relationship.

The testimony was not inadmissible on the ground that the prior assaults were too remote; admissibility is not controlled solely by passage of time, and the evidence showed a pattern of abuse by defendant from the start of the marriage to within three years before the offense. In addition, within months before the shooting, defendant voiced a belief that a man could kill his wife and escape criminal responsibility.

The prior assaults were sufficiently similar to the fatal assault to be admissible. There were a "number of general similarities;" both the shooting and the prior assaults occurred with little or no provocation, defendant had once previously threatened to shoot his wife, and defendant disclaimed responsibility.

People v. Bartall, 98 Ill.2d 294, 456 N.E.2d 59 (1983) Defendant was convicted, at a jury trial, of murder and armed violence. The evidence showed that defendant fired shots into a parking lot from a passing automobile, killing a person named Quinn. Over objection, the State was allowed to introduce evidence of a subsequent shooting incident, in which defendant shot from an automobile into another vehicle.

The evidence "convincingly established" that defendant shot the victim, and the principal issue was whether defendant had the mental state required for murder. Standing alone, the Quinn shooting "might have some ambiguity about it, [but] the two incidents, taken together, increase the certainty that the defendant deliberately acted" with the intent required for murder. The two incidents were sufficiently similar to be admitted. In both instances, defendant fired a handgun out of an automobile at night on the same street. In addition, both attacks were apparently unprovoked.

People v. McKibbins, 96 Ill.2d 176, 449 N.E.2d 821 (1983) When evidence of a defendant's involvement in another crime is not offered to establish a common design or plan, but instead to prove the absence of an innocent frame of mind or the presence of criminal intent, a high degree of similarity between the two offenses is not necessary. Instead, "mere general areas of similarity will suffice."

In this case, evidence of defendant's commission of another crime with the same two companions as in the case on trial, where general similarities between the offenses were present, was admissible to dispel defendant's claim that he was innocently involved in the crime at trial and to show his criminal intent.

People v. Tiller, 94 Ill.2d 303, 447 N.E.2d 174 (1982) Defendant was charged with the armed robbery and murder of a store owner. The evidence showed that defendant and codefendant entered a cleaning establishment. The codefendant shot the proprietor and took money from the cash register. The State introduced evidence showing that, a short time before entering the store, defendant and codefendant murdered and robbed another person on the street a few blocks away. Defendant shot the victim on the street.

Evidence of the prior crime was properly admissible since it "tended to show that defendant was probably aware that the cleaners would be robbed and supported the inference that defendant and [the co-defendant] robbed the cleaners pursuant to an agreed plan." Defendant's intent was the critical issue in this case, and the other crime was admissible to prove that intent. While certain details about the prior crime were irrelevant, there was no prejudice because the details did not "introduce anything new to the jury, but merely corroborated what the jury must have already surmised about the extent of [the victim's] wound."

People v. Alexander, 93 Ill.2d 73, 442 N.E.2d 887 (1982) Defendant was convicted of theft for exerting unauthorized control over the complainant's automobile, in Will County, on November 11, 1979. The complainant was allowed to testify about events that occurred in Cook County on October 31, 1979, when defendant stole the automobile from her. The complainant's testimony included the fact that defendant invaded her home, stole jewelry and money, and abducted her. That evidence was properly admitted to show defendant's knowledge that his use and possession of the automobile was unauthorized and his intent to permanently deprive the complainant of the use of the automobile.

People v. Friedman, 79 Ill.2d 341, 403 N.E.2d 229 (1980) At defendant's trial for conspiracy to commit theft by deception, the State presented a witness who testified that defendant told her he had been previously convicted of mail fraud.

The Supreme Court stated that evidence of a substantially similar transaction is admissible to show specific intent or guilty knowledge when the "underlying facts of the extra-indictment offense are established with sufficient clarity to demonstrate that they are in fact substantially similar." Here, however, there was no evidence of the underlying facts

of the alleged prior conviction and no proof of its substantial similarity. Therefore, it was inadmissible. Reversed and remanded.

Illinois Appellate Court

People v. Smart, 2023 IL App (1st) 220427 At defendant's trial for aggravated criminal sexual abuse, the State was allowed to introduce other-crimes evidence as proof of defendant's intent. Defendant argued such evidence was inadmissible, because intent was not at issue. Rather, he admitted that he slept in the same bed with the minor, but denied that he had any physical contact with him and did not otherwise suggest that there may have been accidental or incidental physical contact.

The appellate court agreed that defendant did not put his intent at issue, so the trial court erred in admitting other crimes evidence as proof of defendant's intent. When a defendant has denied the charge and does not claim accident or mistake, other crimes evidence is unnecessary for purposes of proving intent. See *e.g.* **People v. Cardamone**, 381 Ill. App. 3d 462, 490 (2008).

The error warranted a new trial because the case was a credibility contest between defendant and the complainant. The fact that the trial court acquitted defendant of one of three counts underscored the closeness of the case. The complainant's account was not corroborated with physical evidence, there were no eyewitnesses, and the complainant did not make an immediate outcry. The other crimes evidence was referenced multiple times in the State's questioning of witnesses and in closing. Therefore, the State could not prove beyond a reasonable doubt that the result would have been the same without the error, and a new trial was required.

People v. Adams, 2023 IL App (2d) 220061 At defendant's trial for aggravated criminal sexual abuse against A.S. for incidents occurring at defendant's home, the trial court allowed the State to introduce other-crimes evidence including testimony by the complaining witness, A.S., that defendant had grabbed her midsection, butt, vagina, and breasts on numerous instances while they were in her family's swimming pool during church gatherings at her house (the "swimming pool evidence"), and evidence regarding defendant's guilty plea to attempt criminal sexual abuse against another individual, E.O. ("the plea evidence"). On appeal, defendant argued that the court failed to make a meaningful assessment before admitting the swimming pool evidence and that the plea evidence was not admissible under 725 ILCS 5/115-7.3 because it was not a listed offense.

Regarding the swimming pool evidence, the appellate court agreed that the circuit court failed to conduct a meaningful assessment to determine its admissibility under Section 115-7.3. Where a defendant is charged with aggravated criminal sexual abuse, evidence of defendant's commission of a listed offense is admissible under Section 115-7.3 for "any matter to which it is relevant," including defendant's propensity to commit the charged offense. But, before the evidence can be admitted, Section 115-7.3 also requires that the court weigh its probative value against its prejudicial effect.

Here, the court did not conduct any sort of balancing test regarding the evidence. The judge's statement that he understood "defendant's concern" regarding the swimming pool evidence was not a consideration of the prejudicial effect of the evidence. Instead, it was a reference to defendant's inability to rebut those claims without foregoing his right against self-incrimination because criminal charges based on the swimming pool evidence were pending separately in another county.

The error was harmless, though, where the court could have reasonable found that the probative value of the evidence was not substantially outweighed by its prejudicial effect.

Both the charged conduct and the swimming pool evidence involved A.S., and both involved allegations of touching over the clothing. Additionally, only about a year separated the incidents. While the swimming pool evidence was certainly prejudicial, it fit squarely within the parameters of Section 115-7.3, and its admission was not an abuse of discretion. The dissent would have found the error reversible, disagreeing that the swimming pool evidence and the charged conduct were sufficiently similar or proximate in time.

The court agreed with defendant that the plea evidence was improperly admitted because attempt criminal sexual abuse is not a listed offense under Section 115-7.3. Additionally, it was not admissible to show defendant's intent, motive, or absence of mistake where the State was not able to produce E.O. to testify at trial but rather merely admitted the charging instrument and plea. The conduct involving E.O. occurred 18 years after the charged conduct. And, without E.O.'s testimony, there was no evidence from which the trier of fact could assess whether the prior incident was sufficiently similar to the charged conduct as to demonstrate motive, intent, or absence of mistake. Thus, the probative value of the plea evidence was so low as to be outweighed by its prejudicial effect under Illinois Rule of Evidence 404(b), and it should not have been admitted. But, the court concluded that the error was harmless where the trial judge specifically found A.S. credible, and where her testimony was corroborated by her father's observations and by the swimming pool evidence. There was no reasonable probability that the outcome of defendant's trial would have been different had the plea evidence been excluded.

People v. Mujkovic, 2022 IL App (1st) 200717 Defendant was charged with first degree murder based on his shooting of another customer at a gas station. Defendant asserted self-defense, contending that he believed the other customer had a gun when he lunged at defendant's friend during an altercation. At trial, the State introduced evidence that defendant and his friend had been involved in two other shooting incidents on the night in question. In the first incident, defendant fired from his car at a group of people, striking one of them. And, in the second, defendant fired his gun out the car window into the air.

Defendant argued that the other-shooting evidence was improper propensity evidence. Illinois Rule of Evidence 404(b) generally prohibits the use of other bad acts to prove a defendant's propensity to commit crime. But, such acts may be admissible to prove some other point material to the controversy, such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Here, the other-shooting evidence was admissible on the question of intent. Defendant had put his intent directly at issue by asserting self-defense. Other-crimes evidence may be relevant to the question of intent because it tends to negate inadvertence, accident, self-defense, or other forms of "innocent intent." In this case, the court held that evidence of defendant's two prior unlawful shootings, occurring just hours earlier, makes the claim of innocent intent, in the form of self-defense, less likely. Thus, the other-shooting evidence was properly admitted for a non-propensity purpose.

People v. Cavazos, 2022 IL App (2d) 120444-B The trial court did not abuse its discretion in admitting evidence that defendant was involved in another gang-related shooting later on the same night of the shooting at issue in this case. The evidence was relevant to both motive and intent. Defendant's theory of defense at trial was that he was not present in the SUV during the charged shooting. Regardless of defendant's defense, the State still had to prove defendant's intent beyond a reasonable doubt in order to meet its burden of proof. And, evidence that defendant had motive and acted with intent was relevant to the issue of whether defendant was the offender. Further, the other crimes evidence was not excessive,

and while there were some differences in the circumstances, both incidents shared the similarities including targeting rival gang members and using a gun that belonged to defendant's gang. Thus, there was no error in admitting evidence of the subsequent shooting.

People v. Jones, 2020 IL App (4th) 190909 In a prosecution for unlawful delivery of a controlled substance involving a single transaction, the trial court did not err in admitting evidence of defendant's various other drug transactions. The prosecution could admit such evidence for purposes of showing "intent" and "system of operation" under Rule 404(b).

Although defendant complained of a "mini-trial" on the other crimes evidence given that it took up more than half of the testimony, the Appellate Court held that undue prejudice from extensive other-crimes evidence arises when it is cumulative. Here, much of the testimony was non-cumulative and was aimed at establishing defendant's constructive possession of drugs. The trial court properly instructed the jury nine times during the presentation of other-crimes evidence, foreclosing any possibility of confusion as to the use of such evidence.

People v. Othman, 2020 IL App (1st) 150823-B The trial court erred in admitting other crimes evidence. In a murder trial, the State's witnesses alleged that defendant shot his uncle in 2008, and that in 2010 he gave a gun to his girlfriend. A jailhouse informant testified that defendant told him about the 2008 shooting and the 2010 decision to give a gun to his girlfriend. At trial, the State argued that the informant's knowledge of the gun possession in 2010 lent credence to his testimony that defendant confessed to him. The Appellate Court found reversible error, holding that other crimes evidence can't be used to bolster the credibility of State witnesses. Moreover, the trial court erred when it instructed the jury that the other crime could be considered as evidence of intent, despite the fact that the State used it only to bolster its informant's credibility, causing confusion and prejudice to the defense.

Defendant also received ineffective assistance of counsel because his trial attorney failed to object to hearsay. A State witness testified that she knew defendant killed the decedent because she heard it from "friends in the neighborhood." Counsel's failure to object to these anonymous out-of-court accusations rendered his performance deficient. The decision was not strategic, and prejudicial.

People v. Davis, 2019 IL App (1st) 160408 Evidence of other crimes can be admitted to prove intent, even if intent is not specifically put at issue, because the burden remains on the State to prove intent beyond a reasonable doubt regardless of whether defendant disputes it. Here, evidence that guns were recovered along with the cocaine was relevant to the question of intent to deliver. While the quantity alone, 989 grams, indicated that the cocaine was not likely for personal use, defendant's possession of weapons was properly admitted as additional circumstantial evidence of intent to deliver.

People v. Sims, 2019 IL App (3d) 170417 At defendant's trial for unlawful possession of a weapon by a felon premised on the recovery of a gun from the center console of defendant's car, the trial court did not abuse its discretion in allowing introduction of evidence that defendant had a gun in his vehicle on a prior occasion. Because defendant was not found in actual physical possession of the gun, the State had to prove that he knew it was in his vehicle to establish constructive possession. Where defendant denied knowledge of the gun in the instant case, testimony about the prior gun possession showed both that defendant had a gun in the car on the prior occasion and that he routinely kept a gun in the car. That evidence was relevant to defendant's knowledge, and therefore was properly admitted. The dissenting

justice would have found reversible error because the evidence about the prior firearm incident was of minimal probative value, was a significant focus of the State's closing argument, and was confusing.

People v. Smith, 2019 IL App (4th) 160641 In a prosecution for threatening a public official based upon a voicemail message left on a judge's office phone, the trial court abused its discretion in allowing State to introduce evidence of two inmate request slips that defendant sent from the jail to the judge while awaiting trial. The State asserted that the slips were admissible on the questions of identity, intent, and state of mind. The slips contained multiple citations to bible verses and indicated a desire to see the judge prosecuted for corruption. Defendant's original voicemail message also stated that the judge was corrupt.

The Appellate Court held that identity was not really at issue where other evidence established that it was defendant who left the voicemail message, so the prejudicial impact of the inmate slips outweighed their probative value on the question of identity. Further, the slips were not indicative of state of mind or intent where they were written after defendant had been charged based on the voicemail message and did not demonstrate defendant's intent or state of mind when he left the voicemail message.

Admission of the inmate slips constituted first-prong plain error where the evidence on the question of intent was closely balanced. The voicemail message in question was ambiguous, and the erroneously admitted slips threatened to tip the scales against defendant.

People v. McGee, 2015 IL App (1st) 122000 Defendant was convicted of stalking a CTA employee based on two incidents where he approached her, banged on the windows of her kiosk, and verbally threatened her. The State, over defendant's objection, was also allowed to introduce evidence of a physical altercation between defendant and the CTA employee's husband which occurred two hours after the second incident, when defendant returned to the train station. During that altercation, defendant stabbed the husband with a box cutter. The police later recovered a box cutter from defendant's backpack.

The court held that the admission of altercation between defendant and the husband was improper other crimes evidence and reversible error. The court rejected the State's argument that evidence was admissible as a continuing narrative of the charged offense and to show defendant's intent to harm the CTA employee.

Other-crimes evidence is admissible if it is part of a continuing narrative of the events giving rise to the charged offense or is intertwined with the offense. When facts about the uncharged criminal conduct are part of a continuing narrative of the charged criminal conduct, they do not constitute separate, distinct, and unconnected crimes.

Here, defendant's altercation with the husband was a distinct event that was not part of a continuing narrative. It occurred two hours after his last contact with the CTA employee and did not involve any contact with her. Instead, when defendant returned to the station, the husband approached him and the two began fighting. The incident was thus inadmissible as a continuing narrative.

The incident was also inadmissible to establish defendant's intent to harm the CTA employee since it showed that he arrived at the station with the box cutter. Even though evidence of the box cutter may have been admissible, the State could have done this by simply showing that the box cutter was found in defendant's backpack at the station. It had no need to introduce evidence of the altercation to prove the existence of the box cutter.

The court reversed defendant's conviction and remanded for a new trial.

People v. Johnson, 2014 IL App (2d) 121004 At a jury trial for first degree murder and aggravated criminal sexual assault, the trial court admitted evidence that defendant allegedly committed three other sexual assaults against three different persons. One of the separate offenses occurred 11 years before the charged offenses, and the other two occurred within a few months after the charged offenses. The trial court admitted the other crimes on the issues of propensity, intent, motive, lack of mistake, and *modus operandi*.

The trial court erred by admitting the other crimes for motive, lack of mistake, and *modus operandi*. Because defendant maintained that the sexual intercourse was consensual, neither *modus operandi* nor lack of mistake was at issue. Furthermore, there was nothing in the record to suggest that the other crimes created a motive to commit the instant offense, especially where two of the other crimes occurred after the charged crime and the other occurred several years earlier.

The court concluded, however, that the other crimes evidence was relevant to show defendant's intent and propensity to commit sex offenses, and was therefore properly admitted. The court rejected the State's argument that under **People v. Perez**, 2012 IL App (2d) 100865, evidence that is admitted pursuant to §115-7.3(b) is admitted without limitation concerning its use. The court concluded that because §115-7.3 authorizes the use of other crimes evidence only if relevant and where the probative value is not outweighed by the prejudicial effect, evidence is admissible only on matters that are relevant under the facts of the case.

The court also rejected defendant's argument that reversible error occurred when the jury was instructed that it could consider the other crimes evidence not only for propensity and intent but also for motive, lack of mistake, and *modus operandi*. First, the trial court was not required to give any limiting instruction. Second, precedent holds that where a limiting instruction permits a jury to consider other crimes evidence for a number of reasons, and one of those reasons is determined on appeal to be improper, the conviction must be affirmed despite the overly broad instruction.

People v. Young, 2013 IL App (2d) 120167 Where defendant was charged with unlawful possession of less than 15 grams of cocaine, and evidence of defendant's previous drug use and drug purchases was admitted on the issues of knowledge and intent, it was plain error to instruct the jury that it could consider the prior drug crimes in determining "defendant's knowledge and possession." Because the defendant was charged with possession of a controlled substance, allowing the previous drug offenses to be considered on the issue of possession erroneously implied that the other drug crimes could be used to show a propensity to commit drug offenses. The court stressed that the trial court should have ensured that the instructions limited the jury's use of the evidence to properly admitted purposes.

However, the court concluded that the error was harmless where the evidence was not closely balanced and there was no serious risk that the jurors convicted defendant because they did not understand the law.

People v. Sundling, 2012 IL App (2d) 070455-B Defendant was charged with aggravated criminal sexual abuse against two children. The court concluded that the trial judge erred by admitting three prior convictions for sex offenses against children.

The court held that it was error to admit a 1984 Cook County conviction for indecent liberties and a 1997 Michigan conviction for attempted criminal sexual conduct with a person under the age of 13, because the only evidence consisted of certified copies and a docketing statement for the Cook County case and a copy of the charge and sentencing order in the

Michigan case. Because the supporting evidence was insufficient to permit the trial court to determine that there were similarities between the prior offenses and the instant charges, the evidence should have been excluded.

Similarly, the trial court erred by admitting a 1997 Indiana conviction for child molestation. Although the State introduced a probable cause affidavit from the Indiana case, the affidavit should have been excluded for two reasons. First, the affidavit lacked sufficient indicia of reliability concerning the conduct underlying the conviction because it related to the original charges, not to a subsequent guilty plea which defendant entered after an Appellate Court in Indiana overturned the original conviction.

Second, the affidavit was inadmissible hearsay because it was an out-of-court statement offered to prove the truth of the matters asserted. The court found that the affidavit could not qualify for the business record exception to the hearsay rule; the business record exception does not apply to documents which are prepared in anticipation of litigation, and a probable cause affidavit is clearly created for purposes of litigation.

However, the court concluded that the erroneous admission of the other crimes evidence was not plain error. The defendant did not claim that the error was so serious that it affected the fairness of the trial and challenged the integrity of the process, and the court concluded that the evidence was not closely balanced.

People v. Harding, 401 Ill.App.3d 482, 929 N.E.2d 597 (1st Dist. 2010) Where the defendant was charged with child abduction for attempting to lure children to his car by offering them rides, evidence of prior convictions for attempted aggravated criminal sexual assault and attempted criminal sexual assault was insufficiently similar to the charged crime to justify admission on the issue of intent. The prior crimes involved forcible attacks on adult women who were followed on foot as they left bars, and offered no insight into defendant's intentions when he offered rides to elementary school girls in broad daylight. Instead, the prior offenses merely showed a propensity to commit sexual crimes.

The court rejected the State's arguments that the crimes were sufficiently similar to be admissible because all of the victims were females who were strangers to the defendant; "[w]e are aware of no authority permitting the admission of prior crimes on the basis of such broad generalities."

Defendant's convictions were reversed and the cause remanded for a new trial.

People v. Bobo, 278 Ill.App.3d 130, 662 N.E.2d 623 (5th Dist. 1996) Defendant, a high school teacher, was charged with aggravated criminal sexual abuse for allegedly fondling one of the female students in his class. To show defendant's "intent and/or motive and/or knowledge," the trial court admitted evidence that defendant had allegedly fondled other female students at other times. This evidence was improperly admitted.

The State failed to establish how such evidence showed motive, intent, or knowledge. Defendant denied that the charged incident ever occurred; he did not claim it was an accident. The other crimes evidence served only to demonstrate a propensity to sexually assault or harass female students.

People v. Denny, 241 Ill.App.3d 345, 608 N.E.2d 1313 (4th Dist. 1993) At defendant's trial for home invasion and aggravated criminal sexual assault, evidence that defendant had, several months before the incident at issue, threatened the complainant with a knife was not admissible on the issue of intent, because defendant's intent to be in the home and to engage in sexual intercourse was not disputed.

People v. Woltz, 228 Ill.App.3d 670, 592 N.E.2d 1182 (5th Dist. 1992) Defendant was charged with aggravated criminal sexual assault for alleged committing an act of sexual penetration against V.J. At trial, the court admitted evidence that defendant had also committed a sexual assault against J.S., and instructed the jury that evidence that defendant had "raped" J.S. was admitted to show absence of mistake and "design or plan."

The evidence was not admissible to show absence of mistake. The only act which defendant claimed had been accidental was touching the complainant's breast, while the charge involved penetration of the vagina. In addition, it is improper to admit acts of sexual misconduct with other children to show intent, guilty knowledge or lack of accident or mistake, because those factors are shown by the acts themselves.

People v. Wells, 184 Ill.App.3d 925, 540 N.E.2d 1070 (1st Dist. 1989) At defendant's trial for delivery of cocaine on July 18, evidence of another delivery of cocaine by defendant on August 1 was relevant to establish defendant's knowledge and criminal intent in regard to the offense on trial. See also, **People v. Clark**, 173 Ill.App.3d 443, 526 N.E.2d 356 (2d Dist. 1988).

People v. Blommaert, 184 Ill.App.3d 1065, 541 N.E.2d 144 (3d Dist. 1989) At defendant's trial for the murder of her baby, the State was properly allowed to introduce testimony regarding defendant's previous abusive actions toward the baby to prove intent and lack of accident or mistake.

People v. Connolly, 186 Ill.App.3d 429, 542 N.E.2d 517 (4th Dist. 1989) At a trial for burglary, evidence showing that defendant had committed two burglaries three years earlier was not relevant to intent, knowledge or presence. "Other crimes evidence is admissible only to prove intent, knowledge, or presence if it is closely related to the crime charged in point of time, place and circumstance."

People v. Bailey, 88 Ill.App.3d 416, 410 N.E.2d 545 (3d Dist. 1980) Defendant was convicted of aiding a fugitive for driving a man named Bannister away from an armed robbery scene, knowing that Bannister had committed the offense and intending to prevent his apprehension. Over objection, the State was allowed to introduce evidence of the activities of defendant and Bannister after leaving the scene, for the purpose of proving defendant's knowledge and intent. This evidence included an attempt to locate a certain person to assault and picking up another person for the purpose of robbing her.

Evidence of the subsequent activities was improperly admitted. The relevant "knowledge" element was defendant's knowledge that Bannister had committed the armed robbery. "Since the State had the defendant's statement that Bannister had mentioned robbing the store as soon as he returned to the defendant's car, the subsequent criminal activities evidence was irrelevant on the knowledge element."

Although the subsequent activities may have been probative of defendant's intent to prevent Bannister's apprehension, this purpose could have been achieved without mentioning the criminal behavior. Under Illinois law, "otherwise admissible evidence must be purged of references to other crimes if it is at all possible to do so without doing violence to the probative value of the evidence."

§19-24(b)(4)
Identity; Connecting Defendant to the Crime Charged

Illinois Supreme Court

People v. Carter, 297 Ill.App.3d 1028, 697 N.E.2d 895 (1st Dist. 1998) In a prosecution for drug offenses, the State erred by introducing evidence that the arresting officers were familiar with defendant before he was arrested. By introducing evidence that an officer whose duties included "narcotics surveillance" and "gang surveillance" knew defendant before the arrest, the prosecution created the "obvious inference . . . that [defendant] had been engaged in prior illicit drug or gang activity." Because there were no issues concerning identification, there was no "relevant purpose for repeated references to a narcotics and gang surveillance officer knowing Larry Carter by name."

People v. Richardson, 123 Ill.2d 322, 528 N.E.2d 612 (1988) Following a jury trial, defendant was convicted of murder and armed robbery. The incident occurred in a food and liquor store on April 1, 1980. Two employees of the store testified that after they saw defendant walk to the liquor department, they heard a shot and the warning, "Stay down motherf——r. This is a stickup." Defendant took money out of the cash register and ran from the store. An employee who worked in the liquor department died from a gunshot wound.

The State was allowed to introduce evidence of a shooting that occurred four days later. In that incident, a man identified as defendant entered a tavern, waved a gun, announced a "stickup," jumped over the bar, and shot a bartender as he attempted to run.

Evidence of the subsequent shooting was relevant to identify defendant as the perpetrator of the crimes on trial – because there were "evidentiary links between the two crimes" – expert testimony established that the same gun was used, and eyewitnesses identified defendant as the gunman in the second shooting.

However, evidence concerning another armed robbery on May 4, 1982, was improperly admitted. A police officer testified that he received a radio call concerning a robbery in progress, along with a description of the perpetrator. He went to the scene, saw a man (identified as defendant) who matched the description, and made the arrest. Another officer testified that he obtained a photo of defendant based upon the May 4 armed robbery, and showed it, with other photos, to the witnesses to the 1980 robberies.

The 1982 armed robbery was not admissible to show how the investigation unfolded and how defendant came into custody. The State had not shown any similarity between the 1982 arrest and the 1980 murder which might render the circumstances of the former offense probative of the latter. Further, defendant's apprehension as a suspect in the 1982 armed robbery did not tend to identify him as the armed robber in 1980.

People v. Jones, 105 Ill.2d 342, 475 N.E.2d 832 (1985) Evidence of defendant's commission of a burglary two days before the murder for which he was on trial was properly admitted. A knife taken in the burglary was found at the murder scene, and other items taken in the burglary were found in defendant's possession. This evidence showed "defendant's identity and his presence at the [murder] scene." See also, **People v. Diaz**, 78 Ill.App.3d 277, 397 N.E.2d 148 (1st Dist. 1979) (evidence showing that a weapon used by defendant in a subsequent crime was taken during the robbery for which defendant was on trial).

People v. Stewart, 105 Ill.2d 22, 473 N.E.2d 840 (1984) Defendant was convicted of two murders at a grocery store. Defendant contended that evidence concerning a prior armed robbery was improperly admitted. The victim testified that a certain gun and camera were taken in the robbery. After the murders charged here, the gun and camera were found in defendant's possession The gun was shown to have been used in the instant murders.

Evidence of the prior crime was properly introduced to show that the owner of the gun was not involved in the murders in this case. In addition, coupled with the fact that the gun and camera were found in defendant's possession, the evidence connected defendant to the murder weapon and explained his possession of it.

People v. McKibbins, 96 Ill.2d 176, 449 N.E.2d 821 (1983) Defendant was charged with murder and armed robbery of a parking lot attendant. The victim's body was found in a shack in the parking lot; he was handcuffed with handcuffs that had the markings "Taiwan" and "Stop" on them. Additionally, a rare 1811 coin was taken.

The State was allowed to introduce evidence that two days later, defendant and two others robbed a jewelry store. Defendant and another man went behind the counter to collect the merchandise. The police received a call and arrested the three perpetrators at the store. The 1811 coin was found on one of the perpetrators (not defendant), and two pairs of handcuffs containing the same markings as those mentioned above were found on the floor.

Defendant confessed to the jewelry store robbery. He also said that he had driven his two accomplices to the parking lot where the crimes on trial took place, but said that he remained in the car while his companions entered the shack.

Evidence of the jewelry store robbery was properly introduced because it was relevant to specifically connect the three individuals who committed it with the parking lot murder.

People v. Cole, 29 Ill.2d 501, 194 N.E.2d 269 (1963) At defendant's trial for the sale of narcotics to an undercover agent, evidence of a prior sale by defendant to the agent was admissible because it strengthened the identification of defendant as the seller in the case on trial and made the agent's account of the sale on trial (that he merely walked up to defendant and purchased heroin) more plausible by showing the relationship between the parties.

People v. Ellis, 26 Ill.2d 331, 186 N.E.2d 269 (1962) Evidence that defendant robbed the complainant a few days before the robbery on trial was properly admitted - it was relevant in regard to the complainant's ability to identify defendant. See also, **People v. Butler**, 31 Ill.App.3d 78, 334 N.E.2d 448 (2d Dist. 1975).

Illinois Appellate Court

People v. Serritella, 2022 IL App (1st) 200072 Under Illinois Rule of Evidence 404(b), evidence of other crimes or bad acts may be admitted to prove intent, *modus operandi*, identity, motive, absence of mistake, and any other material fact relevant to the case, except propensity. If the prejudicial impact of such evidence "substantially outweighs" its probative value, however, it may be excluded.

Here, the State's theory of prosecution was that the murder of the teenage victim was sexually motivated. There was no physical evidence of sexual assault; the State's theory was based on defendant's cell mate's testimony that defendant admitted that the murder was sexually motivated, as well as evidence that defendant made statements to others hypothesizing that the murder was sexually motivated (without admitting his involvement in the offense).

In light of that evidence, the trial court did not abuse its discretion in allowing the State to admit the testimony of another teen, T.C., that a few months before the victim's murder, T.C. and defendant had engaged in a sexual conversations and activity over the telephone. Likewise, it was not error to allow the State to introduce a paper recovered from defendant's storage area, labeled "boy profile for exploitation," which contained a list of characteristics, including "8-17 years old," "underachiever," and "from a home where parents

were absent," among others. Both supported the State's theory about motive, specifically defendant's desire for sexual favors from teenage boys. T.C.'s testimony was also admissible to show identity, where defendant repeatedly attempted to misdirect the investigation by stating he had been in the area, driving a white car, on the night in question but had seen the victim flag down and enter a different white car.

The probative value of this evidence was not outweighed by its prejudicial effect. Defendant proceeded to a bench trial, and it is presumed that the judge a bench trial considers evidence only for its proper purpose unless the record shows the contrary. Here, there was no such showing on the record, and thus there was no error.

People v. Smith, 2019 IL App (4th) 160641 In a prosecution for threatening a public official based upon a voicemail message left on a judge's office phone, the trial court abused its discretion in allowing State to introduce evidence of two inmate request slips that defendant sent from the jail to the judge while awaiting trial. The State asserted that the slips were admissible on the questions of identity, intent, and state of mind. The slips contained multiple citations to bible verses and indicated a desire to see the judge prosecuted for corruption. Defendant's original voicemail message also stated that the judge was corrupt.

The Appellate Court held that identity was not really at issue where other evidence established that it was defendant who left the voicemail message, so the prejudicial impact of the inmate slips outweighed their probative value on the question of identity. Further, the slips were not indicative of state of mind or intent where they were written after defendant had been charged based on the voicemail message and did not demonstrate defendant's intent or state of mind when he left the voicemail message.

Admission of the inmate slips constituted first-prong plain error where the evidence on the question of intent was closely balanced. The voicemail message in question was ambiguous, and the erroneously admitted slips threatened to tip the scales against defendant.

People v. Rosado, 2017 IL App (1st) 143741 (modified upon denial of rehearing, 9/12/17) The State charged defendant with a series of drug transactions that occurred on March 18, 23, and 29, 2011. The State elected to try the March 29 transaction first. At trial defendant argued that his brother had sold the drugs and the jury acquitted him. The State next tried the March 23 transaction which is the subject of the present appeal. In that trial, the court allowed the State to admit evidence of the March 29 transaction as other-crimes evidence to prove defendant's identity. The court would not let defendant inform the jury that defendant had been acquitted.

At trial, an uncover officer testified that he purchased drugs from defendant on March 23. The officer also testified that he purchased drugs from defendant on March 29. The officer knew defendant's brother and testified that he did not mistakenly identify defendant in place of his brother. Defendant argued that the officer mistook defendant for his brother. The jury convicted defendant of the March 23 offense.

The Appellate Court held that the trial court improperly admitted the other-crimes evidence to prove identity. The officer could not explain how his ability to identify defendant on March 23 was increased based on a transaction with defendant that occurred six days later. Since this evidence could not bolster identification, and since it had no other relevance, it was improperly admitted.

The trial court also erred in excluding evidence that defendant had been acquitted. In **Ward**, 2011 IL 108690, the Supreme Court held that it was error to exclude evidence of defendant's acquittal in a case where the other-crimes evidence had been admitted as

evidence of propensity in a sexual assault case under 725 ILCS 5/115-7.3. Although the evidence here was admitted to show identity, not propensity, nothing in **Ward** limited the holding to cases involving propensity.

The court reversed defendant's conviction and remanded for a new trial before a different judge. On denial of rehearing, the court explained that a new judge was required because the previous judge made comments and took actions indicating his belief in defendant's guilt for the March 29 transaction. Under these circumstances, reassignment was needed to avoid the appearance of bias.

The court also rejected the State's argument that it did not have authority to reassign criminal cases on remand. The court specifically held that a reviewing court in a criminal case has the authority under Supreme Court Rule 615 to reassign a case to a different judge on remand.

People v. Gregory, 2016 IL App (2d) 140294 After a jury trial, defendant was convicted of threatening a public official and cyberstalking based on a number of e-mails he sent to various public officials with the Village of Oswego and the Oswego police department. These emails contained angry and profanity-laden complaints about perceived official misconduct along with thinly veiled threats against the officials and their families.

At trial, the State also introduced 10 letters defendant sent to the Oswego police department after he was arrested in this case. These letters contained large amounts of profanity and other derogatory language and generally complained that the charges against him were baseless. They also referred to other crimes and bad acts by defendant, including acts of domestic violence, traffic offenses, accusations of being a drug dealer, and a poor employment history.

The court held that such evidence was not admissible. Although portions of the letters were relevant to the issue of identity as they provided circumstantial evidence that defendant sent the emails in question, they also contained a large amount of other-crimes evidence that the State "does not even argue was relevant." Moreover, the evidence of unrelated offenses was so voluminous and inflammatory that there was a great risk the jury would find defendant guilty because of his propensity to commit crimes.

The court reversed defendant's convictions and remanded for a new trial.

People v. Gumila, 2012 IL App (2d) 110761 The common-law rule is that evidence of crimes, wrongs, or acts by the defendant, aside from the crime for which he is being tried, is inadmissible if the prior conduct is relevant solely to establish defendant's propensity to commit an offense such as the one charged. Evidence of other crimes may be admitted for a host of purposes other than to show propensity, such as to prove intent, knowledge, and absence of mistake or accident. Other-crime evidence that is relevant for a proper purpose is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. Whether to admit other-crime evidence lies within the sound discretion of the trial court.

Evidence of Cookies and Favorites found on the hard drive of defendant's computer was admissible in his prosecution for possession of child pornography to prove that defendant knowingly and voluntarily possessed the pornography. Defendant's defense was that he did not seek out the images of child pornography found on his computer, but that those images had appeared by happenstance on his computer screen as he browsed for adult pornography. The Cookies and Favorites proved that defendant revisited sites with names and descriptions suggestive of child pornography. They tended to show that his accessing of illicit images was knowing and voluntary rather than inadvertent. Although defendant did not argue that the

probative value of this evidence was outweighed by its prejudicial effect, it is manifest that the relevance of the Cookies and Favorites far surpassed any potential for unfair prejudice.

People v. Martin, 408 Ill.App.3d 44, 945 N.E.2d 1239 (1st Dist. 2011) The trial court properly admitted evidence that three weeks before the charged offense, defendant shot a different man with the same weapon used in the charged offenses. Although the crimes had little else in common (the charged offenses involved an attempted robbery and the uncharged offense an argument between two groups of men outside a restaurant), the use of the same weapon within a short period of time made it more likely that the perpetrator of the first crime also committed the second.

People v. Pelo, 404 Ill.App.3d 839, 942 N.E.2d 463 (4th Dist. 2010) There was no error in the admission of evidence of pornography found on defendant's computer depicting violence against women, bondage, sadism, and rape, where a significant portion depicted vaginal or anal penetration by a finger or foreign object. This evidence tended to prove defendant's identity as the perpetrator of the sexual assaults, as the perpetrator emulated the acts and scenarios depicted in the pornography, showed a particular interest in that type of activity, and said it gave him pleasure. It was irrelevant that there was no evidence that defendant viewed the pornography contemporaneously to the sexual assaults.

People v. Quintero, 394 Ill.App.3d 716, 915 N.E.2d 461 (3d Dist. 2009) At defendant's trial for murder, the trial judge erred by admitting, on the issue of identification, evidence of a second murder which had been committed some 20 months earlier. Because there was nothing about the earlier offense which connected defendant to the charged offense, the evidence was not probative on identification.

The court found that the evidence was admissible, if at all, only to show *modus operandi* – that the offenses were so similar as to mark them as the handiwork of a single perpetrator. The court found there were insufficient similarities between the offenses to justify admission of the evidence to show *modus operandi*; the State's theory of the crime was similar to a scene from the movie "The Godfather," and was not a distinctive method of committing crimes which could be traced to a single criminal. The court stated that the differences between the two offenses "outweigh the unremarkable similarities. . . such that there was no demonstrated pattern of criminal behavior so distinctive that the separate crimes could be recognized as the handiwork of the defendant."

The improper admission of other crimes evidence may be harmless if the defendant is not prejudiced or denied a fair trial. The State has the burden of persuasion, and to establish harmlessness must show beyond a reasonable doubt that the result would have been the same without the error.

Here, the erroneous admission of other crimes evidence could not be deemed harmless. The evidence of guilt was not overwhelming, and the outcome of the trial depended largely on the credibility of a witness whose believability was suspect.

Defendant's conviction was reversed and the cause remanded for a new trial.

People v. Barbour, 106 Ill.App.3d 993, 436 N.E.2d 667 (1st Dist. 1982) At defendant's trial for rape, the State introduced evidence of two other rapes allegedly committed by defendant. The Appellate Court rejected the State's contention that the other crimes were admissible to establish defendant's identity. Since defendant admitted the sexual intercourse but claimed it was consensual, identity was not in issue.

People v. Turner, 78 Ill.App.3d 82, 396 N.E.2d 1139 (1st Dist. 1979) At defendant's trial for murder and armed robbery, the trial court erred by allowing the State to introduce evidence of defendant's involvement in a subsequent kidnapping, an unrelated offense. The evidence was not relevant to identity or an attempt by defendant to conceal evidence.

People v. Butler, 133 Ill.App.2d 299, 273 N.E.2d 37 (1st Dist. 1971) Defendant denied driving the type of car used in the crimes charged. Defendant was rebutted by a witness who stated she saw defendant in the car previously and was robbed by him at the time. It was error to mention the prior robbery since it was unnecessary. See also, **People v. Blakely**, 8 Ill.App.3d 78, 289 N.E.2d 273 (1st Dist. 1972).

§19-24(b)(5)
Motive

Illinois Supreme Court
People v. Heard, 187 Ill.2d 36, 718 N.E.2d 58 (1999) In a murder case, evidence of defendant's violent acts toward the decedent before her death was admissible to show defendant's motive and intent to harm the decedent and her new boyfriend. The evidence revealed defendant's "continuing hostility and animosity" toward the couple; in addition, defendant's theft of the complainant's clothes showed that "defendant's motive for the murders was his anger over the break-up of his relationship."

People v. Lucas, 151 Ill.2d 461, 603 N.E.2d 460 (1992) In a murder prosecution in which the State claimed that members of a prison gang had killed a prison superintendent in revenge for the death of a fellow gang member, the trial judge erred by admitting evidence of threats and evidence that a correctional officer had been attacked by other members of the gang. There was no evidence that defendant was involved in either the threats or the attack, and the threats were too remote in time to justify admission where they ceased about two weeks before the superintendent's death. However, the errors were found to be harmless. See also, **People v. Smith**, 141 Ill.2d 40, 565 N.E.2d 900 (1990) (plain error to admit evidence of defendant's gang membership to show motive; alleged motive on the part of gang member to retaliate against the decedent was never linked to defendant, who was not shown to be a gang member or to be acting on behalf of a gang).

People v. Illgen, 145 Ill.2d 353, 583 N.E.2d 515 (1991) Where defendant was tried for first degree murder arising out of the shooting death of his wife, evidence of prior incidents in which defendant had abused the decedent was properly admitted to show intent and motive. Such evidence tended to negate the likelihood that the shooting was accidental and showed that defendant and the decedent had an antagonistic relationship.

The testimony was not inadmissible on the ground that the prior assaults were too remote; admissibility is not controlled solely by passage of time, and the evidence showed a pattern of abuse by defendant from the start of the marriage to within three years before the offense.

People v. Hendricks, 137 Ill.2d 31, 560 N.E.2d 611 (1990) Following a jury trial, defendant was convicted of the murders of his wife and children. The evidence against defendant was entirely circumstantial.

The State was allowed to introduce evidence of defendant's alleged increasingly aggressive sexual involvement with women he employed to model back braces he sold. The purpose of this evidence was to establish a motive for the murders (i.e., his increasing sexual conduct allegedly created a conflict with his religious beliefs, divorce was not a viable option, and defendant would have been ostracized from his church had his sexual conduct become known).

The Supreme Court discussed the testimony of the models in the order in which they came in contact with defendant, as compared to the order in which their testimony was presented by the State, and concluded that no escalation of sexual aggression was shown. "Evidence may not be manipulated to support a theory. When the models' testimony is considered in its proper order, it presents no more than a haphazard series of encounters, isolated instances of what could be labeled by some as sexual attraction or clumsy attempts with adolescent urges. . . . [W]e are not prepared to find that the prejudicial impact of the testimony is outweighed by its probative value."

Evidence of uncharged misconduct "undermines the presumption of innocence," the State failed to prove any escalation of sexual aggression by defendant, the record "suggests that the prosecution's purpose in presenting the testimony about the models was aimed at inflaming the jury's passions against the defendant," and the prosecutor utilized this evidence in closing argument "to portray the defendant as having an evil disposition and to indicate that the models were victims" rather than for the limited purpose of motive. Thus, the models' testimony should have been stricken.

Without the models' testimony or proof of any escalating sexual aggression, the testimony about defendant's religious beliefs and background was irrelevant and highly prejudicial.

People v. Devin, 93 Ill.2d 326, 444 N.E.2d 102 (1982) At defendant's trial for the murder of a jail inmate, another inmate testified that defendant had committed the murder. He also testified that defendant said he planned to inform authorities that the victim was murdered by two other inmates, who were notorious in the county. As a reward for this information, defendant believed that the State would reduce his sentence on armed robbery charges pending against him.

The testimony was proper to show defendant's motive. While reference to "pending charges" is preferable to the specific reference to armed robbery, the reference to armed robbery was not so prejudicial as to require reversal.

People v. Witherspoon, 27 Ill.2d 483, 190 N.E.2d 281 (1963) At defendant's trial for the murder of a police officer, the State properly introduced warrants showing that defendant was charged with crimes in Michigan. This evidence was relevant to show a motive for killing the officer, who was attempting to arrest him. See also, **People v. Olson**, 96 Ill.App.3d 193, 420 N.E.2d 1161 (2d Dist. 1981). Compare, **People v. Wilson**, 116 Ill.2d 29, 506 N.E.2d 571 (1987) (mere existence of arrest warrant is not relevant unless defendant knew of it).

Illinois Appellate Court

People v. Kendrick, 2023 IL App (3d) 200127 During his confession to a murder, defendant admitted to prior burglaries, and mentioned he was on parole. The statements were admitted at defendant's murder trial.

The trial court erred when it denied defendant's motion *in limine* to redact the statements by removing the references to prior crimes. While the State argued that the other

crimes evidence was admissible to prove motive, the appellate court disagreed because the State offered other evidence of motive – defendant's co-defendant stated that defendant intended to rob the victim, as did defendant's own statement. Thus, there was no need for the State to present evidence that defendant had robbed homes on prior occasions or was on parole to establish defendant's intent to rob the victim. However, the evidence of guilt – a confession and eyewitness testimony – was overwhelming, rendering the error harmless.

People v. Serritella, 2022 IL App (1st) 200072 Under Illinois Rule of Evidence 404(b), evidence of other crimes or bad acts may be admitted to prove intent, *modus operandi*, identity, motive, absence of mistake, and any other material fact relevant to the case, except propensity. If the prejudicial impact of such evidence "substantially outweighs" its probative value, however, it may be excluded.

Here, the State's theory of prosecution was that the murder of the teenage victim was sexually motivated. There was no physical evidence of sexual assault; the State's theory was based on defendant's cell mate's testimony that defendant admitted that the murder was sexually motivated, as well as evidence that defendant made statements to others hypothesizing that the murder was sexually motivated (without admitting his involvement in the offense).

In light of that evidence, the trial court did not abuse its discretion in allowing the State to admit the testimony of another teen, T.C., that a few months before the victim's murder, T.C. and defendant had engaged in a sexual conversations and activity over the telephone. Likewise, it was not error to allow the State to introduce a paper recovered from defendant's storage area, labeled "boy profile for exploitation," which contained a list of characteristics, including "8-17 years old," "underachiever," and "from a home where parents were absent," among others. Both supported the State's theory about motive, specifically defendant's desire for sexual favors from teenage boys. T.C.'s testimony was also admissible to show identity, where defendant repeatedly attempted to misdirect the investigation by stating he had been in the area, driving a white car, on the night in question but had seen the victim flag down and enter a different white car.

The probative value of this evidence was not outweighed by its prejudicial effect. Defendant proceeded to a bench trial, and it is presumed that the judge a bench trial considers evidence only for its proper purpose unless the record shows the contrary. Here, there was no such showing on the record, and thus there was no error.

People v. Cavazos, 2022 IL App (2d) 120444-B The trial court did not abuse its discretion in admitting evidence that defendant was involved in another gang-related shooting later on the same night of the shooting at issue in this case. The evidence was relevant to both motive and intent. Defendant's theory of defense at trial was that he was not present in the SUV during the charged shooting. Regardless of defendant's defense, the State still had to prove defendant's intent beyond a reasonable doubt in order to meet its burden of proof. And, evidence that defendant had motive and acted with intent was relevant to the issue of whether defendant was the offender. Further, the other crimes evidence was not excessive, and while there were some differences in the circumstances, both incidents shared the similarities including targeting rival gang members and using a gun that belonged to defendant's gang. Thus, there was no error in admitting evidence of the subsequent shooting.

People v. Saulsberry, 2021 IL App (2d) 181027 The Appellate Court rejected defendant's assertion that improper evidence was admitted at his murder trial. First, defendant argued improper other crimes evidence was admitted when an accomplice testified that prior to the

shooting, defendant had been "hunting" for opposing gang members. The Appellate Court questioned whether this was even other crimes evidence because it described defendant's behavior leading up to the crime itself. Regardless, the evidence was admissible to show motive.

Second, a gang member witness testified that, after the murder, when defendant entered a room with a gang leader, the leader told the witness to shake defendant's hand because he was the one who "took care of it." The Appellate Court found the handshake and the comment were nonhearsay, admitted not for the truth of the matter asserted but rather to show the effect on the witness. Defendant pointed out that **In re Zariyah A.**, 2017 IL App (1st) 170971, **People v. Hardimon**, 2017 IL App (3d) 120772, and **People v. Theis**, 2011 IL App (2d) 091080, all held that incriminating nonhearsay, even if admissible to show the effect on the listener, should only be admitted when necessary. The Appellate Court rejected these holdings, finding no need for a heightened standard where the evidence could be excluded if its prejudicial effect substantially outweighed the probative value. Here, the witness used the statement to explain why he shook the hand of defendant, a lower-ranking gang member. And while a limiting instruction may have been possible, the defense forfeited this option by not requesting the instruction below.

The court did note, however, that the statement could not be admitted as a tacit admission, where the record did not show defendant had an adequate opportunity to hear and respond to the accusation.

People v. Mitchem, 2019 IL App (1st) 162257 At defendant's trial for aggravated vehicular hijacking and aggravated kidnaping, the trial court did not abuse its discretion in allowing the State to introduce evidence that defendant had kidnaped the complainant for ransom just a few months prior to the incident on trial. The prior kidnaping was "highly relevant" to show defendant's motive for targeting the complainant, who was a longtime friend of defendant. Specifically, in the prior kidnaping, defendant had obtained $100,000 in ransom, and the motive was to once again kidnap defendant for ransom.

People v. Felton, 2019 IL App (3d) 150595 At defendant's bench trial on a charge of attempt murder, the trial court did not err in admitting evidence of defendant's prior home invasion because the State's theory was that the defendant attempted to kill the victim, who was also his accomplice in the home invasion, to prevent him from telling the police what he knew. The Appellate Court presumed that the trial judge only considered the evidence for the purpose for which it was admitted (motive), and her comments on the record confirmed as much. The Appellate Court cautioned, however, that the State introduced more evidence of the home invasion than necessary and that its opinion in this case should not serve as an endorsement of using extensive amounts of other-crimes evidence.

The Appellate Court also noted that the same judge had presided over both the home invasion and attempt murder trials, though the home invasion had been a jury trial. Although no challenge was raised to this procedure, the Court noted that it would have been "optimal" to have a different judge preside over the attempt murder case in this circumstance.

People v. Weston, 2011 IL App (1st) 092432 Evidence that the defendant was a member of a gang or was involved in gang-related activity is admissible to provide a motive for an otherwise inexplicable act. Because street gangs are regarded with considerable disfavor, and there may be strong prejudice against street gangs, particularly in metropolitan areas, trial courts should exercise great care in exercising discretion to admit gang-related testimony.

Gang evidence is only admissible when the prosecution can demonstrate a clear connection between the crimes and the gang evidence.

Two sisters were shot in the course of a search of their apartment by defendant and his brother, who were looking for weapons belonging to defendant's cousin. No evidence connected the weapons to any gang, only to defendant's cousin. There was testimony that in the course of the search defendant expressed concern about his cousin going to prison for life if the police recovered the weapons. The familial relationship between defendant and his cousin provided the clear explanation for defendant's actions, not his gang membership. The gang evidence was unnecessary to provide a motive for an otherwise inexplicable act, and should have been excluded. As the gang evidence was irrelevant, its probative value could never outweigh its prejudicial impact.

The court affirmed defendant's convictions after finding the error harmless.

People v. Jackson, 399 Ill.App.3d 314, 926 N.E.2d 786 (1st Dist. 2010) Unprosecuted drug use is admissible to establish a motive for the charged offense only if the prosecution demonstrates that the defendant was addicted to narcotics and lacked the financial resources to sustain his habit.

Here, the State failed to present sufficient preliminary evidence to introduce defendant's drug use as a motive to commit murder. There was no evidence that defendant's drug use was habitual rather than recreational, and the only evidence concerning defendant's financial condition was that he had just cashed an unemployment check.

Because the State failed to provide a sufficient foundation, defendant's drug use was improperly admitted to establish a motive for murder. The court also noted that at trial, the prosecutor argued that defendant's drug use should be considered only as reflecting his poor character, and not as evidence of motive.

Although defendant objected on hearsay grounds to the admission of his statements about his drug use, at trial he did not argue that he was prejudiced because the statements revealed the commission of other crimes. The court concluded, however, that the plain error rule applied because the evidence was closely balanced and because the error was of sufficient magnitude to deny a fair trial.

People v. Lovejoy, 235 Ill.2d 97, 919 N.E.2d 843 (2009) Where the defendant was charged with the first degree murder of his stepdaughter, the trial court properly admitted, as evidence of motive, the stepdaughter's allegations that the defendant had sexually assaulted her. The court noted that the trial court weighed the probative value and prejudicial effect of such evidence, limited the testimony that was admitted, and gave a limiting instruction.

Admission of such evidence did not violate the right to confrontation under **Crawford v. Washington**, which holds that testimonial hearsay is inadmissible unless the witness is unavailable for trial and there was a prior opportunity for cross-examination. The statements fell outside the **Crawford** rule because they were admitted not to prove the truth of the matter asserted – that the defendant had assaulted the decedent – but to prove a possible motive for the murder.

Defendant's conviction was reversed and the cause remanded for a new trial.

People v. Hansen, 313 Ill.App.3d 491, 729 N.E.2d 934 (1st Dist. 2000) Evidence of defendant's pedophilia was not admissible at a murder trial to prove motive and intent, because most of the evidence pertained to incidents that occurred in the 20-year-period after the decedents' murders. "The defendant could hardly be said to have been motivated to kill the victims in 1955 to prevent the discovery of acts of pedophilia that he committed in the

1960s and 1970s." Furthermore, although an officer testified that defendant admitted picking up and have sex with young male hitchhikers "from the 1950s through 1974," such "vague testimony" was insufficient to establish a motive for killings in 1955.

People v. Knight, 309 Ill.App.3d 224, 722 N.E.2d 331 (2d Dist. 1999) Any connection between domestic battery and a threat made six weeks later was "too tenuous to establish motive." Although the threat indicated that defendant did not want the complainant to sleep with his friends and the offense in question concerned an alleged beating and rape after the complainant mentioned oral sex with a former boyfriend, "there was no evidence that the former boyfriend was one of defendant's friends." The mere fact that defendant may have had a "jealous nature was not specific enough to establish motive" for the offense in question.

People v. Maounis, 309 Ill.App.3d 155, 722 N.E.2d 749 (1st Dist. 1999) In a prosecution for theft, evidence of drug addiction is relevant to motive if the State establishes that defendant was addicted to a drug, used it in such quantities that maintenance of his habit was expensive, and lacked sufficient income from legal sources to sustain his habit. The State's evidence failed to satisfy this foundation when it did not show that defendant was addicted (but only that he had used alcohol and crack cocaine), or that he lacked sufficient funds to pay for any drug use (it was undisputed that on the day of the offense defendant had at least $1,047).

People v. Richmond, 201 Ill.App.3d 130, 559 N.E.2d 302 (4th Dist. 1990) At defendant's trial for first degree murder for the beating death of a woman in November 1988, the State was allowed to introduce evidence that the victim had obtained an order of protection against defendant in May 1988, and that defendant had beaten the victim in the summer of 1988 while he was trying to get money from her. This evidence was properly admitted to show motive and defendant's dislike for the victim.

People v. Reimnitz, 72 Ill.App.3d 761, 391 N.E.2d 380 (1st Dist. 1979) At defendant's trial for the murder of his wife, the State's use of evidence that defendant engaged in a homosexual act 7½ months after the murder was improper. The purpose of this evidence (to show a homosexual preference and a motive for the murder) was "far outweighed by its inflammatory effect upon the jury."

People v. Mac Rae, 47 Ill.App.3d 302, 361 N.E.2d 685 (1st Dist. 1977) At defendant's trial for attempt murder, the State properly introduced evidence that defendant had previously forged his wife's name on certain documents. This evidence showed a motive for the attempt murder since the victim had threatened to expose the situation to defendant's wife.

§19-24(b)(6)
Time and Place Proximity

Illinois Supreme Court
People v. Lindgren, 79 Ill.2d 129, 402 N.E.2d 238 (1980) At defendant's trial for murder, the State introduced evidence showing that shortly after the offense, defendant committed an arson a few blocks away. The State contended that the evidence was admissible to establish defendant's presence near the murder scene at the critical time.

"Generally, time and place proximity, without more, is an insufficient basis for permitting other crimes evidence." The State could have established the time and place

proximity without mentioning the arson — "the same witness could testify to time and place proximity without mentioning a distinct crime" and without hindering the prosecution in any "legitimate way."

Illinois Appellate Court

People v. Fuerback, 66 Ill.App.2d 452, 214 N.E.2d 330 (1st Dist. 1966) At defendant's trial for an armed robbery that occurred at 10:50 a.m., defendant and his mother testified that he was in her apartment at the time of the crime and did not leave until noon. In rebuttal, the State called a witness who testified that defendant robbed her grocery store at 11:40 a.m.

Evidence of the other robbery was improper. The rebuttal witness could have testified that defendant was in her store without mentioning the robbery.

§19-24(b)(7)
Consciousness of Guilt

Illinois Supreme Court

People v. Lindgren, 79 Ill.2d 129, 402 N.E.2d 238 (1980) At defendant's trial for murder, evidence showing that a short time after the murder defendant committed an arson a few blocks away was not relevant to show a consciousness of guilt (in that defendant attempted to destroy evidence of the murder (a gun) by way of the arson). There was no evidence to support the theory – the State's own witness testified that the arson was intended to punish the person who resided at the scene of the arson and not to conceal evidence.

People v. Baptist, 76 Ill.2d 19, 389 N.E.2d 1200 (1979) Evidence showing that defendant attempted to kill an eyewitness is admissible to show a consciousness of guilt.

People v. Gambony, 402 Ill. 74, 83 N.E.2d 321 (1948) A defendant's attempt to bribe or intimidate a witness is admissible to show consciousness of guilt. See also, **People v. Goodman**, 55 Ill.App.3d 294, 371 N.E.2d 168 (4th Dist. 1977).

Illinois Appellate Court

People v. Abernathy, 402 Ill.App.3d 736, 931 N.E.2d 345, 2010 WL 2673073 (4th Dist. 2010) Other crimes evidence may be admitted if it is part of a "continuing narrative" of the events giving rise to the offense. Thus, evidence may be admitted if it is intertwined with the offense charged, even if an uncharged offense is disclosed.

Where defendant was charged with an aggravated domestic battery in his residence, evidence that a fire was set at the same location a few minutes later was part of a continuing narrative of the circumstances surrounding the battery, rather than evidence of a separate and distinct crime. The court stressed that the battery and fire occurred at the same location, the fire destroyed some of the evidence of the battery, the fire was started within minutes after the battery, and two of the officers assigned to investigate the battery began their inquiry at the scene of the fire. Under these circumstances, the continuing narrative theory applied.

Under the "consciousness of guilt" theory for admitting other crimes evidence, evidence that the defendant attempted to conceal his involvement in a crime, either by destroying evidence or attempting to eliminate a witness, is admissible even if an uncharged crime is disclosed. Here, the trial court properly admitted evidence that defendant committed arson in order to conceal evidence that he had committed domestic aggravated battery.

The better practice is for the trial court to instruct the jury of the limited purpose of other crimes evidence both at the time the evidence is admitted and at the close of the case. However, reversal was not required where the trial court gave only an instruction at the close of trial.

People v. Knight, 309 Ill.App.3d 224, 722 N.E.2d 331 (2d Dist. 1999) The trial court erred by admitting a statement defendant allegedly made six weeks after a domestic battery, in which he said that he would break the complainant's legs if she slept with another of his friends. The statement did not show "consciousness of guilt," because defendant's threat did not relate to the offense being prosecuted or to any other criminal acts which defendant had committed in the past.

§19-24(b)(8)
Circumstances of Arrest; Narrative of Crime

Illinois Supreme Court
People v. Adkins, 239 Ill.2d 1, 940 N.E.2d 11 (2010) Other-crime evidence may be admitted as part of a continuing narrative if it is part of the circumstances attending the entire transaction and does not involve separate, distinct, and disconnected crimes. The continuing-narrative exception is inapplicable even where offenses occur in close proximity to each other, if the offenses are distinct and undertaken for different reasons at a different place and at a separate time.

Defendant's statement admitting to the commission of other burglaries and describing the technique he used was not admissible under the continuing-narrative exception to the use of other-crime evidence. But this evidence was properly admitted for a purpose other than to prove defendant's propensity to commit burglary. Defendant's statement supported his theory of defense that he committed the burglary but left before any murder, by showing that he had developed a technique to avoid detection and contact with residents of the homes he burglarized.

People v. Jackson, 232 Ill.2d 246, 903 N.E.2d 388 (2009) Evidence which suggests that defendant has engaged in prior criminal acts should not be admitted unless it is relevant. The steps taken to investigate a crime may be relevant when necessary and important to a full explanation of the State's case, including where such evidence is necessary to explain a lapse of time between an eyewitness's identification of the assailant and an arrest. Even where such evidence discloses other crimes, it is presented for a purpose other than to show defendant's propensity to commit crime. However, evidence of the steps taken in an investigation is not relevant unless it specifically connects defendant with the crimes for which he is being tried.

The State did not introduce other crimes evidence where a State's witness testified that he entered two unknown DNA samples from the crime scene into a State DNA database, and received information that the samples matched defendant's DNA. First, the evidence was relevant to explain the five-year-lapse between the initial recovery of blood samples and defendant's arrest. In the absence of some explanation of the delay, the jury would have been left to speculate about the authorities' ability to identify defendant nearly six years after the offense.

Second, the fact that a defendant's DNA is included in a DNA database does not necessarily suggest that he is a prior offender. The witness did not claim that the database

was composed of samples from convicted offenders; in fact, the database contained samples from several additional sources.

People v. Nieves, 193 Ill.2d 513, 739 N.E.2d 1277 (2000) The trial judge erred by permitting the prosecutor to read into the record portions of a pretrial statement indicating that when defendant surrendered to New York law enforcement authorities, he discussed crimes that had occurred in both Chicago and New York. Defendant's New York crimes were not relevant to explain the manner in which he was placed in custody by Chicago police.

Other crimes evidence may be admissible to show "steps in the investigation of the crime and events leading to it," only if the evidence specifically connects defendant with the crimes for which he is being tried. Defendant's criminal activities in New York had no relevance to whether he committed a murder in Illinois, and should not have been admitted.

People v. Lewis, 165 Ill.2d 305, 651 N.E.2d 72 (1995) Evidence of other crimes is not admissible merely to show how an investigation unfolded; it must also be relevant to specifically connect defendant with the crimes for which he is being tried. See also, **People v. Overton**, 281 Ill.App.3d 209, 666 N.E.2d 753 (1st Dist. 1996) (other crime evidence inadmissible because it did not connect defendant to the offense); **People v. Brown**, 275 Ill.App.3d 1105, 657 N.E.2d 642 (1st Dist. 1995).

People v. Richardson, 123 Ill.2d 322, 528 N.E.2d 612 (1988) At defendant's trial for a murder and armed robbery that occurred on April 1, 1980, a police officer testified about another crime and his arrest of defendant on May 4, 1982. The officer testified that on May 4, 1982, he received a radio call of a robbery in progress and a description of the perpetrator. He went to the scene, saw defendant (who matched the description), and made an arrest. A photo of defendant was taken and shown to the witnesses of the 1980 crimes.

Testimony pertaining to the 1982 crime was error because it was not admissible to show the course of the investigation or circumstances of defendant's arrest. There was no 'threshold similarity' between the 1982 arrest and the 1980 murder rendering the circumstances of one probative of the other. Further, defendant's apprehension on the 1982 armed robbery did not tend to identify him as the 1980 armed robber. Finally, the other crimes evidence "was not relevant as part of a 'continuing narrative' of the original crime, since it clearly related to a separate, distinct, and disconnected crime."

People v. McKibbins, 96 Ill.2d 176, 449 N.E.2d 821 (1983) Defendant was charged with the murder and armed robbery of a parking lot attendant. The victim's body was found in a shack in the parking lot and was handcuffed with handcuffs which had the markings "Taiwan" and "Stop." In addition, a rare 1811 coin was taken.

The State was allowed to introduce evidence that two days later defendant and two others robbed a jewelry store. The 1811 coin was found on one of the perpetrators (not defendant), and two pairs of handcuffs containing the same markings as mentioned above were found on the floor

Defendant confessed to the jewelry store robbery. He also said that he had driven his two accomplices to the parking lot (where the crimes on trial took place), but remained in the car while they entered the shack.

Evidence of the jewelry store robbery was relevant to show the circumstances of defendant's arrest. "It would be difficult to explain or describe circumstances surrounding the defendant's arrest without introducing a substantial amount of the evidence concerning the jewelry robbery."

People v. Lindgren, 79 Ill.2d 129, 402 N.E.2d 238 (1980) At defendant's trial for murder, testimony showing that a short time after the murder defendant committed an arson a few blocks away was not admissible as part of a continuing narrative of the crime. The arson was "a distinct crime undertaken for different reasons at a different place at a separate time."

Illinois Appellate Court

People v. Reichert, 2023 IL App (5th) 180537 In a prosecution for conspiracy to deliver cannabis, defendant argued that the trial court erred when it admitted evidence that another member of the conspiracy shot a police officer. The appellate court disagreed. The officer was shot by a co-conspirator who was fleeing from another shooting motivated by a drug deal gone wrong. Thus, the shooting was evidence of an act committed in furtherance of the conspiracy.

The appellate court also disagreed that the evidence was inadmissible as unduly prejudicial under Rule 403. The evidence was relevant to prove the conspiracy, and the State did not accuse defendant of being the actual shooter, thus limiting the prejudice. Although the State improperly elicited irrelevant details about the officer's injury and its long term impact on his life, defendant failed to preserve this specific error, having only raised a general objection to the evidence of the shooting.

People v. Saulsberry, 2021 IL App (2d) 181027 The Appellate Court rejected defendant's assertion that improper evidence was admitted at his murder trial. First, defendant argued improper other crimes evidence was admitted when an accomplice testified that prior to the shooting, defendant had been "hunting" for opposing gang members. The Appellate Court questioned whether this was even other crimes evidence because it described defendant's behavior leading up to the crime itself. Regardless, the evidence was admissible to show motive.

Second, a gang member witness testified that, after the murder, when defendant entered a room with a gang leader, the leader told the witness to shake defendant's hand because he was the one who "took care of it." The Appellate Court found the handshake and the comment were nonhearsay, admitted not for the truth of the matter asserted but rather to show the effect on the witness. Defendant pointed out that **In re Zariyah A.**, 2017 IL App (1st) 170971, **People v. Hardimon**, 2017 IL App (3d) 120772, and **People v. Theis**, 2011 IL App (2d) 091080, all held that incriminating nonhearsay, even if admissible to show the effect on the listener, should only be admitted when necessary. The Appellate Court rejected these holdings, finding no need for a heightened standard where the evidence could be excluded if its prejudicial effect substantially outweighed the probative value. Here, the witness used the statement to explain why he shook the hand of defendant, a lower-ranking gang member. And while a limiting instruction may have been possible, the defense forfeited this option by not requesting the instruction below.

The court did note, however, that the statement could not be admitted as a tacit admission, where the record did not show defendant had an adequate opportunity to hear and respond to the accusation.

People v. Crawford, 2021 IL App (5th) 170496 At defendant's trial for aggravated battery for striking another individual in the back of the head with a beer bottle while inside a bar, it was error to allow the State to question the bar's bouncer about a subsequent shooting outside the bar which also involved defendant and the purported battery victim. Prior to trial, the judge had ruled the shooting incident inadmissible. But, when the bouncer brought up the shooting in response to a defense question on cross-examination, the State argued that it

required admission of the details of the shooting as part of a continuing narrative, and the trial court agreed.

On appeal, the State cited "continuing narrative" case law, but made no argument regarding the continuing narrative exception to the general ban on other crimes evidence. Accordingly, the Appellate Court found that argument forfeited under Illinois Supreme Court Rule 341(h)(7). The court went on to note that the exception would not apply, regardless, because admission of the shooting evidence was unnecessary to explain conduct which might otherwise be implausible or inexplicable.

The court also rejected the argument that defendant had "opened the door" to the other crimes evidence, entitling the State to introduce details of the shooting under the doctrine of "curative admissibility." The bouncer's initial testimony about the shooting was limited and not prejudicial to the State's case. Accordingly, it was improper to admit additional evidence of the shooting and to argue the shooting as substantive evidence of defendant's guilt of the earlier battery incident.

The evidence was closely balanced where both defendant and the State presented plausible versions of the events in question, and neither version was corroborated by physical evidence. Under those circumstances, the outcome depended on which witnesses the jury found more credible. Accordingly, the improper admission of other-crimes evidence threatened to tip the scales of justice against defendant and amounted to plain error requiring a new trial.

People v. Jacobs, 2016 IL App (1st) 133881 Defendant was charged with possession of a stolen motor vehicle. At trial, the son of the owners of the vehicle testified that jewelry was taken from his parents' house at the same time the vehicle was stolen. The son testified that when he went to a pawn shop to see if he could find his mother's jewelry, he saw defendant drive the stolen car away from the store.

Before trial, the trial court granted a motion in limine excluding the evidence that jewelry had been taken from the home. However, the trial court overruled defense objections when the prosecutor mentioned the jewelry in opening argument. The trial judge then stated that the evidence was admissible to show that the car had been stolen.

The Appellate Court held that the evidence was improperly admitted as other crimes evidence, and was especially prejudicial where the trial court refused to allow defendant to present evidence that another person had been arrested for burglarizing the house.

The Appellate Court concluded that even if the continuing narrative exception applied, the probative value of the evidence that jewelry was stolen was substantially outweighed by the prejudicial effect. The court noted that the State could have established that the son saw defendant driving the stolen vehicle without stating that the car had been at a pawn shop and creating an inference that defendant had been involved with the burglary and theft of the jewelry. The evidence was prejudicial to defendant not only because it created an unmistakable inference that he was involved in a crime for which he was not on trial, but also because it directly impacted his defense that he had been allowed to drive the car by an acquaintance and did not know it had been stolen.

People v. Hale, 2012 IL App (1st) 103537 Defendant made a statement to the police admitting his involvement in two shootings. According to the statement, defendant and his companions were driving around armed with guns with the intent to retaliate against a person named Mario. When they exited their car to look for Mario, they were fired upon, and fired back in self-defense. Defendant believed that someone had been shot during that exchange of gunfire, and in fact an innocent bystander was struck by bullets. Several minutes

later and several blocks from the first shooting, defendant and his companions fired at a car they believed to contain Mario.

The trial court denied the State's motion *in limine* to admit evidence of the first shooting at defendant's trial for the second shooting under the continuing-narrative exception, finding it more prejudicial than probative. The court noted that it would reconsider its ruling if the defense attacked the integrity of defendant's statement in any way.

The Appellate Court held that the trial court abused its discretion in excluding the other-crime evidence. The evidence of the first shooting was offered to prove the ongoing motive of defendant and his companions to locate and shoot Mario. Even though they did not initiate the gunfire in the earlier shooting, they had exited their car with the intent to locate and shoot Mario. Therefore, the two shootings were not separate and distinct. The evidence of the earlier shooting proved defendant's intent and a common criminal design supporting defendant's accountability for the later shooting.

The other-crime evidence was also admissible to corroborate defendant's confession as the police were not aware of his participation in the first shooting at the time he made the admission. Although the trial court had ruled that it would allow admission of the other-crime evidence if the defendant challenged the statement, the State was entitled to establish the accuracy and reliability of the statement in its case- in-chief. The trier of fact must determine the weight and reliability of the statement regardless of whether defendant challenges its reliability.

The Appellate Court further held that any danger that the case would become a mini-trial on the first shooting would be avoided by holding the State to its proffer that it only intended to offer the testimony of the victim of the earlier shooting that she heard gunshots and was shot at a particular location, but was unable to identify the perpetrator. The probative value of this evidence substantially outweighed its risk of unfair prejudice.

Cunningham, J., dissented. The abuse-of-discretion standard is the most deferential standard of review. An abuse of discretion occurs only when no reasonable person would agree with the trial court's decision. The majority simply substituted its judgment for that of the trial court. There was no legitimate reason to admit the evidence of the earlier shooting. Taking defendant's statement at face value, the exclusion of evidence of the first shooting created no risk of jury confusion. The only commonality between the two shootings was the search for Mario. The trial court's judgment that the probative value of the evidence of the first shooting was outweighed by its prejudicial effect of creating the impression of a crime spree was not an abuse of discretion.

People v. Abernathy, 402 Ill.App.3d 736, 931 N.E.2d 345, 2010 WL 2673073 (4th Dist. 2010) Evidence of other crimes is admissible if relevant for any reason other than to show propensity to commit crime. Such evidence may be admitted to show motive, intent, identity, absence of mistake, or *modus operandi*. Evidence of other crimes may also be admitted as part of a continuing narrative of events and to show consciousness of guilt.

Even where other crimes evidence is introduced for a permissible reason, it should be excluded if the probative value is substantially outweighed by the danger of unfair prejudice. Although the trial court did not explicitly state that it balanced prejudice and probative value before deciding to admit the other crimes evidence, it was clear that the judge performed the required balancing test because it limited the State to introducing the evidence most closely related to the charged offense.

Other crimes evidence may be admitted if it is part of a "continuing narrative" of the events giving rise to the offense. Thus, evidence may be admitted if it is intertwined with the offense charged, even if an uncharged offense is disclosed.

Where defendant was charged with an aggravated domestic battery in his residence, evidence that a fire was set at the same location a few minutes later was part of a continuing narrative of the circumstances surrounding the battery, rather than evidence of a separate and distinct crime. The court stressed that the battery and fire occurred at the same location, the fire destroyed some of the evidence of the battery, the fire was started within minutes after the battery, and two of the officers assigned to investigate the battery began their inquiry at the scene of the fire. Under these circumstances, the continuing narrative theory applied.

Under the "consciousness of guilt" theory for admitting other crimes evidence, evidence that the defendant attempted to conceal his involvement in a crime, either by destroying evidence or attempting to eliminate a witness, is admissible even if an uncharged crime is disclosed. Here, the trial court properly admitted evidence that defendant committed arson in order to conceal evidence that he had committed domestic aggravated battery.

The better practice is for the trial court to instruct the jury of the limited purpose of other crimes evidence both at the time the evidence is admitted and at the close of the case. However, reversal was not required where the trial court gave only an instruction at the close of trial.

People v. Hill, 278 Ill.App.3d 871, 663 N.E.2d 503 (5th Dist. 1996) Defendant was convicted, in a jury trial, of unlawful delivery of a controlled substance. At trial, the State introduced a tape-recording made by a police informant who was "wired for sound" as he walked in an area frequented by defendant. As the informant walked, he talked to the monitoring officers, to defendant's brothers, and "[o]n occasion . . . to himself."

On appeal, defendant argued that the trial court erred by admitting recorded conversations between the informant and the monitoring officers, defendant's brothers, and a third person. Defendant also argued that the informant's "gratuitous commentary to himself" should have been excluded. In response, the State argued that the challenged evidence was part of the res geste of the criminal offense.

There is no res geste exception to the hearsay rule. Various courts and legal scholars have "criticized the notion of res geste for its imprecision;" the exception fails "to contribute to an understanding of the problem and inhibit[s] any meaningful analysis." In addition, continued use of the res geste exception "will continue to obscure rational analysis and . . . demean established evidentiary rules designed to promote the admission of reliable evidence." See also, **People v. Giles**, 261 Ill.App.3d 833, 635 N.E.2d 969 (4th Dist. 1994) (repudiating the res geste exception).

People v. Pittman, 126 Ill.App.3d 586, 467 N.E.2d 918 (1st Dist. 1984) The officer who arrested defendant testified that he ran defendant's name through the National Crime Information Center and learned that defendant was wanted on five charges, including armed robbery. This testimony was not properly admissible as part of a continuous narrative of the arrest. Testimony that defendant was wanted for armed robbery may have been admissible, but testimony about five other charges was "gratuitous and overbroad."

People v. Spiezio, 105 Ill.App.3d 769, 434 N.E.2d 837 (2d Dist. 1982) At defendants' trial for burglary a police officer was allowed to testify, over objection, that defendants were arrested for another, unrelated crime (theft of a motor vehicle). Evidence of the collateral crime was improper because it was not relevant to any issue in the trial — there was no showing that the stolen vehicle was used in the burglary or that its proceeds were found in the vehicle.

People v. Johnson, 104 Ill.App.3d 572, 432 N.E.2d 1232 (1st Dist. 1982) The State was properly allowed to admit evidence of other crimes to establish the reason for defendant's arrest. See also, **People v. Davis**, 93 Ill.App.3d 187, 416 N.E.2d 1179 (1st Dist. 1981).

§19-24(b)(9)
Details of Other Crimes

Illinois Supreme Court
People v. Robinson, 167 Ill.2d 53, 656 N.E.2d 1090 (1995) Although the trial court is required to carefully limit evidence of other crimes to that which is relevant to the purpose for which it was admitted, defense counsel failed to object to the extraneous testimony thereby waiving the issue. Furthermore, the plain error doctrine did not apply because the State presented "persuasive identification testimony."

People v. Richardson, 123 Ill.2d 322, 528 N.E.2d 612 (1988) When evidence of another crime is admitted on the question of identity, "it should be confined to such details as show the opportunity for identification and not the details of the crime."

People v. Bartall, 98 Ill.2d 294, 456 N.E.2d 59 (1983) "The trial court should carefully limit evidence of another crime to evidence that is relevant to the issue on which the other crime is admitted." In this case, conducting a "mini-trial" as to the other crime was unnecessary but not prejudicial. See also, **People v. Tiller**, 94 Ill.2d 303, 447 N.E.2d 174 (1982); **People v. McKibbins**, 96 Ill.2d 176, 449 N.E.2d 821 (1983).

Illinois Appellate Court
People v. Cerda, 2021 IL App (1st) 171433 The evidence was sufficient to prove defendant's guilt under the common design theory. The State alleged that defendant was accountable for three murders because he was a member of a "crew" that engaged in drug conspiracies involving the victims. Although the State did not conclusively prove which crew member killed the victims, circumstantial evidence, including phone records, DNA, motive, and other evidence established that the crew was responsible.

Additional evidence established that defendant engaged in a common criminal design or agreement with the crew. Defendant was present at several drug transactions with the crew and the victims. Witnesses described him as the crew's "watchdog" because he stood guard outside of the car in which the transactions took place. He shared the same tattoo as them, was in a car with them after one of the murders, and was seen recovering two guns from another member's garage. He was with the crew at the scene of the crime and, according to his girlfriend, on the day of the offense defendant did not pick up their kids and come home after work as he usually did, instead returning home late at night with $4000 and a gun that was eventually linked to the crimes by ballistics testing.

The Appellate Court also found no abuse of discretion in the trial court's admission of the extensive details regarding various drug conspiracies. Defendant alleged the "other crimes" evidence was so extensive that it caused undue prejudice in his defense of the murder charges. But when the State establishes the existence of a conspiracy, all evidence of that conspiracy is admissible, even though the commission of other crimes is disclosed. Additionally, the evidence was admissible for the limited purposes of motive, identity, and common design.

People v. Brown, 319 Ill.App.3d 89, 745 N.E.2d 173 (4th Dist. 2001) Even where other crimes evidence is admissible, the trial court must carefully limit the evidence to that which is relevant to the case. Cumulative evidence of uncharged conduct may prejudice defendant by "overpersuading" the jury that defendant is a bad person, and may lead to a conviction for reasons other than defendant's guilt of the crime charged.

In this case, the admission of excessive other crimes evidence "switched the focus of the trial to the prior incident." Four of the State's 12 witnesses testified only about the prior incident, and two other witnesses testified about the prior incident in addition to the charged crime. Thus, half of the State's witnesses testified about the uncharged conduct. In addition, much of the testimony about the prior crime was repetitive.

People v. Thigpen, 306 Ill.App.3d 29, 713 N.E.2d 633 (1st Dist. 1999) Although the other crimes evidence had some relevance to the existence of a common plan or scheme to eliminate competition in selling drugs and might have been relevant to the issue of identity, the probative value of the evidence was outweighed by its prejudicial effect where the trial judge admitted extensive details about the uncharged crime. Many of the details "could only serve to portray the defendant as callous and remorseless." In addition, the other crimes were more serious than the offenses for which defendant was being tried.

The trial judge was criticized for admitting a photograph of the corpses of the victims of the other crimes and for sending the photograph to the jury room during deliberations. The photograph was "the clearest example" of the way in which unnecessary detail concerning the other crimes was admitted. Trial judges often refuse to allow juries to see photographs of the victim of the crime charged. "To send back a photo of the victims of another crime laid at the defendant's feet is extraordinary."

People v. Nunley, 271 Ill.App.3d 427, 648 N.E.2d 1015 (1st Dist. 1995) Defendant was charged with the murder and armed robbery of a drug dealer. At trial, the State introduced testimony that defendant had confessed to the offenses some 16 months after they happened, while he was in custody on unrelated charges of stabbing his mother and killing her dog.

Two police officers and an assistant State's Attorney testified that defendant said he attacked his mother and the dog because they were possessed by Satan. Defendant said he felt better because he had confessed, and one of the officers asked whether defendant had committed any other crimes. Defendant then confessed to the murder and armed robbery at issue here.

The trial judge erred by admitting evidence of the unrelated crimes against defendant's mother and her dog. Although some evidence of these offenses would have been admissible to show that defendant's confession was voluntary, the "detail and repetitive manner" with which the evidence was presented "greatly exceeded" its relevance to voluntariness and "subjected defendant to a mini-trial over conduct far more grotesque than that for which he was on trial."

People v. Kimbrough, 138 Ill.App.3d 481, 485 N.E.2d 1292 (1st Dist. 1985) The evidence concerning the other crime was detailed only to the extent necessary to show defendant's modus operandi and that the other crime was actually committed. See also, **People v. Maness**, 184 Ill.App.3d 149, 539 N.E.2d 1368 (4th Dist. 1989).

People v. Olson, 96 Ill.App.3d 193, 420 N.E.2d 1161 (2d Dist. 1981) At defendant's trial for the attempt murder of a police officer, attempting to elude a police officer, and other offenses,

the State was allowed to introduce evidence that defendant was on parole and work release at the time and that he had committed a burglary earlier the same day.

Introduction of "some evidence" of other offenses to show motive (i.e., why defendant responded the way he did upon the encounter with a police officer) was proper. However, too much evidence of other crimes was presented. Five witnesses described the burglary incident and two witnesses testified that defendant was on parole and work release.

People v. Diaz, 78 Ill.App.3d 277, 397 N.E.2d 148 (1st Dist. 1979) At defendant's trial for a tavern armed robbery the State was allowed, over objection, to introduce lengthy testimony concerning defendant's commission of a subsequent offense (the attempt armed robbery of a pregnant woman).

That testimony was improper. The principal relevance of the subsequent offense was in showing the circumstances of defendant's arrest and that the weapon used was stolen during the tavern robbery. If the subsequent-offense testimony had been limited to the armed robbery attempt, the prejudice would not have clearly outweighed its probative value. However, the alleged victim was permitted to give lengthy testimony about that offense, including detailed testimony of threats against her and her unborn child and therefore the prejudicial effect outweighed the probative value of that evidence.

People v. Butler, 31 Ill.App.3d 78, 334 N.E.2d 448 (2d Dist. 1975) The complaining witness testified not only concerning the armed robbery incident on trial, but also about his identification of defendant during another robbery 12 days earlier. He also gave a detailed description of the prior incident.

When evidence of a prior offense is admissible on the question of identity, it should be "confined to such details as show the opportunity for identification and not the details of the crime." Here, the emphasis on the prior offense was prejudicial and was not cured by a limiting instruction or by evidence that defendant had been acquitted of the prior offense.

§19-24(c)
Evidence Suggesting Other Criminal Conduct

Illinois Supreme Court
People v. Nelson, 193 Ill.2d 216, 737 N.E.2d 632 (2000) Where identification is a material issue, testimony relating to the use of mug shots may be introduced, however, such evidence must not be used to suggest that defendant has committed unrelated criminal acts. Here, the jury was informed that mug shots had been taken on three different occasions that were far enough apart for defendant's appearance to change, and that the most recent photograph was taken near the time of the offenses that were being prosecuted. This was "precisely" the type of evidence that should have been excluded, and the error was not harmless.

People v. Arman, 131 Ill.2d 115, 545 N.E.2d 658 (1989) It was improper for a police officer to mention that a photo of defendant which was identified by a witness came from the police department identification file:

> "There is no dispute that when identification is a material issue at trial, testimony relating the use of mug shots in an investigation may be introduced to show how a defendant was initially linked to the commission of an offense. . . . The admissibility of such evidence is not without limits, however. Mug shot evidence tending to inform the jury of a defendant's

> commission of other, unrelated criminal acts should not be admitted. . . . In this case, [the officer's] reference to the photograph's having come from the Chicago Police Department's identification files informed the jury that the person depicted had been previously arrested, and the testimony was, therefore, evidence of other crimes that should not have been admitted."

People v. Wilson, 116 Ill.2d 29, 506 N.E.2d 571 (1987) At defendant's trial for the murder of two police officers, the State introduced evidence of an outstanding warrant for defendant at the time of the incident. This evidence was not relevant to show that defendant had a motive for the killings (i.e., to avoid arrest), where the State did not produce any evidence to show that defendant knew that the arrest warrant existed or that the officers were arresting him pursuant to the warrant. "The existence of the arrest warrant does not by itself show that the defendant was trying to avoid apprehension. Unless the defendant knew about the warrant or knew that the officers were attempting to arrest him, the existence of the warrant does not establish anything about the defendant's state of mind."

People v. Bryant, 113 Ill.2d 497, 499 N.E.2d 413 (1986) A police officer who arrived at the scene of the crime testified that he saw defendant running away and called him by name. The record did not show how the officer knew defendant, and defendant contended that the testimony improperly suggested a prior criminal record. "Although the prosecutor did not argue that the officer's prior acquaintance with the defendant was evidence of a criminal history, that implication may be conveyed by testimony of this nature, and for that reason it is better avoided, unless somehow relevant. It did not appear to have any relevance here."

People v. Owens, 102 Ill.2d 145, 464 N.E.2d 252 (1984) During his examination of a police officer, the prosecutor on three occasions referred to "the matter at hand." Defendant alleged that these references improperly suggested that other criminal charges were pending against him. The comments were not flagrant and "any error was harmless beyond a reasonable doubt."

People v. Lampkin, 98 Ill.2d 418, 457 N.E.2d 50 (1983) It was error for a police officer to testify that defendant had been arrested previously. "[I]t is fundamental that mere proof of an individual's arrest cannot be used against that individual in a criminal case since the evidence of an arrest would prejudice the defendant in the eyes of the jurors. . . . Where such irrelevant material is contained in an otherwise competent statement or confession, it must be deleted before the statement or confession is read to the jury, unless to do so would seriously impair its evidentiary value."

People v. Stover, 89 Ill.2d 189, 432 N.E.2d 262 (1982) The prosecutor erred by eliciting testimony from a police officer that he was previously acquainted with defendant, since it suggested prior criminality on the part of defendant. This testimony was not probative of the issue of defendant's knowledge that the officer was in fact a police officer, an essential element of the offense of resisting, because the police officer testified at length as to his official attire on the day of the arrest. Thus, defendant's knowledge of the officer's status was already shown.

People v. Berlin, 75 Ill.2d 266, 388 N.E.2d 412 (1979) It was not improper for the State, on cross-examination of defendant, to inquire into his true name (Sanders) and ask if that name

was different from the name (Berlin) defendant gave to the police and under which he was charged. Such questioning was relevant "to clarify defendant's true identity."

Such questioning was did not necessarily imply prior criminal activity. The jury "could easily have supposed any number of innocent reasons for defendant's having adopted a different name [and] it is merely speculation to conclude that a jury will automatically associate an assumed name with a criminal background." See also, **People v. Canacho**, 71 Ill.App.3d 943, 389 N.E.2d 1213 (1st Dist. 1979).

Illinois Appellate Court

People v. Davis and People v. Graham, 2018 IL App (1st) 152413 The trial court did not abuse its discretion in admitting gang evidence. The State provided evidence that the shooting was gang motivated, and therefore gang evidence was relevant. The State did not call an expert on gang evidence or inundate the jury with gang evidence, and therefore the gang evidence was not overly prejudicial. Although evidence suggested that co-defendant Davis was in a different gang from the two gangs at war, evidence did show that co-defendant Graham was in one of the two warring gangs and that Davis acted in concert with Graham.

People v. Jacobs, 2016 IL App (1st) 133881 Defendant was charged with possession of a stolen motor vehicle. At trial, the son of the owners of the vehicle testified that jewelry was taken from his parents' house at the same time the vehicle was stolen. The son testified that when he went to a pawn shop to see if he could find his mother's jewelry, he saw defendant drive the stolen car away from the store.

Before trial, the trial court granted a motion in limine excluding the evidence that jewelry had been taken from the home. However, the trial court overruled defense objections when the prosecutor mentioned the jewelry in opening argument. The trial judge then stated that the evidence was admissible to show that the car had been stolen.

The Appellate Court held that the evidence was improperly admitted as other crimes evidence, and was especially prejudicial where the trial court refused to allow defendant to present evidence that another person had been arrested for burglarizing the house. Even if the continuing narrative exception applied, the probative value of the evidence that jewelry was stolen was substantially outweighed by the prejudicial effect. The court noted that the State could have established that the son saw defendant driving the stolen vehicle without stating that the car had been at a pawn shop and creating an inference that defendant had been involved with the burglary and theft of the jewelry. The evidence was prejudicial to defendant not only because it created an unmistakable inference that he was involved in a crime for which he was not on trial, but also because it directly impacted his defense that he had been allowed to drive the car by an acquaintance and did not know it had been stolen.

In addition, defendant was improperly precluded from introducing evidence that another person had been arrested for the burglary of the home. First, the trial judge erred by finding that the excluded evidence was hearsay where it referred only to the fact of an arrest, and not to any out-of-court assertion. Second, the concerns underlying the admission of other-crimes evidence are not present where the uncharged crime was committed by someone other than the defendant. Exclusion of the evidence here was critical because the fact that another person was arrested for the burglary could have dispelled much of the prejudice created by the admission of evidence of the burglary and theft of the jewelry.

The evidentiary errors were not harmless. The improperly admitted evidence created an inference that defendant had committed a burglary of the home and therefore likely stole the car which he was charged with possessing, directly contradicting his claim that he did not know the vehicle was stolen. In addition, the trial court failed to give a limiting

instruction concerning the other crimes evidence. Finally, the risk of prejudice was increased because defendant was impeached with a prior conviction for residential burglary, the offense to which he was improperly linked by the other crimes evidence.

The conviction was reversed and the cause remanded for a new trial.

People v. Roman, 2013 IL App (1st) 110882 Evidence that defendant was a gang member or involved in gang-related activities is admissible to show a common purpose or design, or to provide a motive for an otherwise inexplicable act. However, due to the possibility of strong prejudice against street gangs, gang-related evidence is admissible only if there is adequate proof that membership or activity in the gang is related to the crime charged. The trial court must take great care in admitting gang-related testimony.

The trial court erred at a trial for first degree murder by admitting testimony from eyewitnesses that defendant was a member of the Latin Kings. The Court rejected the State's argument that such evidence strengthened eyewitness identifications of the defendant as one of the perpetrators. Although two of the eyewitnesses stated that they knew defendant was a gang member, none of the eyewitnesses based their identifications of defendant on that fact. Instead, the witnesses stated that they recognized the perpetrators of the offense because they had seen them in the neighborhood for several years. Thus, gang membership was not related to the identifications.

Similarly, the trial court improperly admitted photographs of defendant's tattoos and testimony from a police officer that the tattoos showed that defendant was a member of the Latin Kings. Although the judge also admitted this evidence to corroborate eyewitnesses' identifications, none of the witnesses mentioned the tattoos or suggested that the tattoos were an aid in identifying defendant as one of the perpetrators. Thus, the evidence was not relevant to the identifications and had the effect of inflaming the jury.

Furthermore, the gang evidence was not admissible to support the State's theory that the murder was gang related. The State argued that the perpetrators killed the victim to avenge a perceived slight to the Latin Kings a few weeks earlier, when workers at the factory where the offense occurred gave shelter to a man who was being beaten. The court stressed that the State failed to present any evidence to show that the instant offense was intended as retaliation for a perceived slight. In addition, there was no evidence that either this incident or the prior one was gang related, as there was no testimony that the perpetrators flashed gang signs, yelled gang slogans, or otherwise indicated that they were members of a gang.

The court concluded that the error was not harmless beyond a reasonable doubt, noting that there was no physical evidence tying defendant to the offense and that the admission of gang evidence always carries a strong risk of prejudice.

Finally, the trial judge erred by denying defense counsel's request to remove a "Gang Unit" sticker from the State's courtroom cart, especially since the State had no objection. Given the strong risk of prejudice that is inherent whenever a jury is exposed to gang-related evidence, the presence of the sticker on the cart had the potential to negatively impact the defense. The court stated, "Whether the case involves gang affiliation or not, fairness dictates that the cart be identified with a sticker that does not transmit a potentially prejudicial message, especially when an innocuous alternative is so easy."

People v. Maldonado, 402 Ill.App.3d 411, 930 N.E.2d 1104 (1st Dist. 2010) A witness's isolated reference to having obtained the defendant's DNA profile or fingerprint record from a database does not constitute reversible error if the reference is either: (1) necessary to explain the course of the investigation, or (2) ambiguous concerning whether the evidence

resulted from prior criminal activity. A reference is "isolated" if there is neither direct evidence nor argument at trial concerning the defendant's prior criminal record.

The court declined to reverse the conviction where a State fingerprint examiner testified that she obtained defendant's fingerprint card from the "Bureau of Identification in Joliet." First, the remark was isolated because there was no evidence or argument concerning defendant's prior offenses. Second, the remark was ambiguous because jurors are aware that fingerprints may result from incidents other than an arrest, including obtaining government employment. Finally, defense counsel did not request a limiting instruction, but instead chose to clarify on cross-examination that the fingerprint card may have been created as a result of defendant's arrest on this charge, rather than from some unrelated arrest. Under these circumstances, there was no likelihood of prejudice.

People v. Agee, 307 Ill.App.3d 902, 719 N.E.2d 251 (1st Dist. 1999) Evidence that the arresting officer was assigned to "a special operations unit concentrating on narcotics and gang weapons activity" and was familiar with the area in which the arrest occurred because it was a "high narcotic activity area" was irrelevant to defendant's alleged commission of unlawful use of a weapon, and implied to the jury that defendant had engaged in uncharged narcotics offenses. Under Illinois law other crimes evidence offered to provide a narrative of events leading to an arrest is admissible only if there "is some relevant purpose to the evidence, connecting defendant to the offense" for which he is being tried.

People v. Carter, 297 Ill.App.3d 1028, 697 N.E.2d 895 (1st Dist. 1998) In a prosecution for drug offenses, the State erred by introducing evidence that the arresting officers were familiar with defendant before he was arrested. By introducing evidence that an officer whose duties included "narcotics surveillance" and "gang surveillance" knew defendant before the arrest, the prosecution created the "obvious inference . . . that [defendant] had been engaged in prior illicit drug or gang activity." Because there were no issues concerning identification, there was no "relevant purpose for repeated references to a narcotics and gang surveillance officer knowing Larry Carter by name."

People v. Mason, 274 Ill.App.3d 715, 653 N.E.2d 1371 (1st Dist. 1995) In a prosecution for murder of a gang member, the State erred by introducing evidence that defendant was a "regent" in the Gangster Disciples. According to the testimony, a "regent" is a gang member responsible for selling drugs, protecting drug territories and hiding weapons. Although the witnesses did not claim that defendant had committed any specific crimes, testimony that he had responsibility for conducting the gang's criminal activity was analogous to "other crimes" evidence and had "the same tendency to inflame the juror's [sic] passions."

People v. Taylor, 244 Ill.App.3d 806, 612 N.E.2d 943 (4th Dist. 1993) In a jury trial, defendant was convicted of public indecency. In opening argument, the trial judge sustained defense objections to the prosecutor's statement that the investigating officer suspected defendant once he heard the description of the offense. However, the trial court overruled objections to remarks that the description gave the officer "a better idea as to who the defendant was."

At trial, the officer testified that when he showed a photo lineup to the eyewitness, he covered the bottom part of the pictures to conceal the fact that he was using booking photographs.

The jury was improperly informed that defendant had been previously arrested. It was completely unnecessary for the officer to disclose that he was using booking photographs, as he could have merely said that he obtained the photographs from the police station.

People v. McCorkle, 239 Ill.App.3d 1014, 607 N.E.2d 296 (3d Dist. 1993) Defendant was charged with the aggravated criminal sexual abuse of his daughter's 16-year-old babysitter. Defendant's former wife testified that defendant often went to the restaurant where the complainant worked. The State's Attorney then elicited that the ex-wife began dating defendant when she was 16 and defendant was 36. In closing argument, the prosecutor rhetorically asked about defendant's pursuing "jail bait" and commented that he had done so before when he dated his ex-wife.

Plain error occurred both in the elicitation of the evidence and in the prosecutor's argument. The evidence was used solely to imply a propensity to commit sexual crimes with young women, and thus violated the rule against admission of "other crimes" evidence. Because the evidence was close, the conviction was reversed and the cause remanded for a new trial.

People v. Barnes, 182 Ill.App.3d 75, 537 N.E.2d 949 (1st Dist. 1989) At defendant's trial for unlawful use of firearms by a felon, three police officers testified that defendant was in possession of $4,000 when he was arrested. This fact was also mentioned by the prosecutor in opening statement and in closing argument.

Although the amount of cash recovered from defendant was not relevant for proving the crime charged, "the jury was bombarded with this irrelevant evidence, which took on the appearance of being a central issue to be considered by the jury in its assessment of defendant's credibility and which could only have suggested to the jury that the cash was obtained through some illegal means." This error, along with others, required a new trial.

People v. Mendiola, 171 Ill.App.3d 936, 526 N.E.2d 172 (1st Dist. 1988) At his trial for murder, defendant presented an alibi defense. Before defendant's sister (Victoria) took the stand, the prosecutor indicated that he would cross-examine her about alibi testimony she had given for defendant in another case. The defense objected on the ground that such testimony would inform the jury that defendant had an arrest record. The prosecutor argued that the testimony would prove the bias of Victoria. The trial judge ruled that Victoria could be cross-examined about previously testifying on defendant's behalf, but the prosecutor could not refer to her prior testimony as alibi testimony.

During the cross-examination of Victoria about her prior testimony, the prosecutor brought out, over objection, that she was not an eyewitness in that case and was not there to be a character witness.

The fact Victoria had previously testified for defendant "does not necessarily" establish a bias or a motive to fabricate on defendant's behalf. "The probative value of such testimony is greatly outweighed by the prejudicial effect of suggestion to the jury that defendant was previously charged with some criminal offense." Also, the "prosecutor completely ignored the trial court's admonishment . . . not to inform the jury that Victoria Mendiola had testified for defendant as an alibi witness."

People v. Davis, 173 Ill.App.3d 300, 527 N.E.2d 552 (1st Dist. 1988) A mugshot book from which a witness identified defendant's photo was properly sent to the jury. The book was necessary to show the jury the photo from which defendant was first identified and to show the accuracy and fairness of the identification. Also, the jury requested the book. The possible

prejudice was outweighed by the probative value. See also, **People v. Neely**, 184 Ill.App.3d 1097, 540 N.E.2d 931 (3d Dist. 1989).

People v. Burns, 171 Ill.App.3d 178, 524 N.E.2d 1164 (1st Dist. 1988) It was improper for the State to bring out that a police officer had known defendant by the name of "Jabbo." Although it is proper to question a defendant regarding his use of assumed names "if proof of the assumed names is shown to be material," it is "highly prejudicial and improper" to adduce such evidence "solely to raise the inference that the defendant had used assumed names in order to evade apprehension by law enforcement officers for prior criminal offenses."

People v. Brown, 146 Ill.App.3d 101, 496 N.E.2d 1020 (1st Dist. 1986) It is well-settled that evidence of an alias can be admitted only if it is relevant to some fact at issue. Here, the State introduced defendant's driver's license, issued under his alias, and argued that it was relevant to prove that defendant had blue eyes (a witness had testified that the robber had blue eyes). Use of the license for that purpose was "unjustifiable" – defendant was present in court for the jury to see and the "State could have asked that the record reflect their observations regarding defendant's eye color."

People v. Harbold, 124 Ill.App.3d 363, 464 N.E.2d 734 (1st Dist. 1984) The prosecutor erred in eliciting testimony from a police officer that certain guns (unrelated to the charge on trial) had been found in defendant's home.

People v. Spiezio, 105 Ill.App.3d 769, 434 N.E.2d 837 (2d Dist. 1982) References by police officer to the fact that defendant had been under police surveillance was improper.

People v. Goodwin, 69 Ill.App.3d 347, 387 N.E.2d 433 (3d Dist. 1979) On direct examination at defendant's jury trial, a police officer was asked what defendant did upon his arrest, and the officer responded, "he asked me to let him go, he did not want to go back to prison again." The remark was an improper reference to prior criminal conduct.

People v. Wheeler, 71 Ill.App.3d 91, 388 N.E.2d 1284 (2d Dist. 1979) Discussion of the use of mug shots. See also, **People v. Cruz**, 71 Ill.App.3d 76, 388 N.E.2d 1330 (2d Dist. 1979).

People v. Pumphrey, 51 Ill.App.3d 94, 366 N.E.2d 433 (1st Dist. 1977) Cross-examination of defendant and his wife concerning their prior use of assumed names was improper, because their use of assumed names had nothing to do with the issues in the case.

People v. Watson, 55 Ill.App.3d 564, 371 N.E.2d 113 (1st Dist. 1977) At defendant's armed robbery trial it was reversible error for prosecutor to tell the jury, in his opening statement, that defendant had been arrested on an unrelated armed robbery charge, and to elicit testimony from a police officer that defendant had been arrested for another "incident."

People v. Wade, 51 Ill.App.3d 721, 366 N.E.2d 528 (5th Dist. 1977) It was reversible error for the prosecutor to bring out, during examination of two police officers, that they had been investigating defendant for involvement in five other crimes.

People v. Strawder, 25 Ill.App.3d 961, 325 N.E.2d 10 (2d Dist. 1975) A police officer testified that he had known defendant for about five years and had known him by four different names. Defendant did not object to the testimony, but moved for a mistrial at the

conclusion of the State's case. "It would appear . . . that the State did not attempt to bring in evidence of his criminal record, but merely that the police officer had known defendant for five years under different names. This information might lead one to suspect the prior behavior of the individual, but it does not allege or even raise questions about a prior criminal record."

People v. Hawkins, 4 Ill.App.3d 471, 281 N.E.2d 72 (3d Dist. 1972) Use of "mug shots" of defendant was reversible error since they suggested prior crimes.

People v. Hudson, 7 Ill.App.3d 333, 287 N.E.2d 297 (3d Dist. 1972) Testimony that defendant's fingerprints were on file at the Bureau of Identification was error since it implied prior crimes.

§19-25
Photographs

Illinois Supreme Court
People v. Smith, 2022 IL 127946 Defendant was convicted of burglary of an apartment. Prior to trial, defendant sought to bar admission of two short video clips of surveillance footage showing the hallway outside of the apartment. In one clip, defendant was seen standing outside of the apartment door for a moment. In the other, approximately 20 minutes later, defendant was seen exiting the apartment. No video showed defendant entering the apartment, but there was evidence that an outside window to the apartment appeared to have been tampered with. The two video clips had been recorded by pointing an iPhone video camera at a video monitor as the surveillance footage played because the apartment manager was unable to otherwise export the video footage before its automatic deletion. Defendant's motion was denied, and the video clips were admitted and played for the jury.

On appeal, defendant argued that the trial court erred by admitting the video clips under either Rule 1003 or 1004 of the Illinois Rules of Evidence. Alternatively, he argued that the video clips should have been barred under the best evidence rule.

Rule 1003 allows for the admission of a "duplicate" video to the same extent as the original unless there is a genuine question of authenticity of the original or it would be unfair under the circumstances to admit the duplicate in lieu of the original. Under Rule 1001(4), a duplicate can be produced "by means of photography" or "electronic re-recording" or equivalent methods "which accurately reproduces the original." And, Rule 1004 allows a party to use other evidence to prove the contents of lost or destroyed recordings, so long as the original was not lost or destroyed in bad faith.

Defendant argued that the cell phone video clips were not duplicates, specifically that they did not accurately reproduce the original because they captured only two small portions of the original footage. The Court disagreed. Rule 1001(4) does not require that a duplicate reproduce the original in its entirety. And, the admission of only portions of the original was not unfair under Rule 1003. Defense counsel was able to cross-examine the apartment manager about the decision to record only portions of the original surveillance, and was able to argue the potential significance of the missing portions to the jury. Thus, the jury was able to determine what weight to give the video clips, and their admission was not unfair.

Because the video clips were properly admitted under Rule 1003, it was unnecessary to consider the application of Rule 1004. The Court also held that the common law best evidence rule was abrogated by the codification of the Illinois Rules of Evidence. Thus, the

best evidence rule could not serve as an independent basis to challenge admission of the video clips.

People v. Thompson, 2016 IL 118667 Under Illinois Rule of Evidence 701, lay opinion identification testimony is admissible if the testimony is (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or a determination of a fact in issue. When the identification is being made from a video recording or a photograph, both of which the jury is able to view for itself, the court held that such testimony is helpful where there is some basis for concluding that the witness is more likely to correctly identify the defendant than the jury.

It is not necessary to show that the witness has had sustained contact or intimate familiarity with, or special knowledge of the defendant. Instead, the witness must only have had contact with the defendant beyond what the jury has had to achieve a level of familiarity that would make the opinion helpful.

Courts should use a totality of circumstances approach in deciding whether such testimony is admissible, and should consider the following factors in making that decision: (1) the witness's general familiarity with the defendant; (2) the witness's familiarity with the defendant at the time the recording was made; (3) whether the witness observed the defendant dressed in a manner similar to the person depicted in the recording; (4) whether the defendant was disguised in the recording or changed his appearance between the time of recording and trial; and (5) the clarity of the recording and extent to which the person is depicted.

The absence of any of the above factors does not render the testimony inadmissible. And the extent of a witness's opportunity to observe the defendant goes to the weight, not admissibility, of the evidence.

Additional rules apply when lay opinion identification testimony is presented by law enforcement officers. Here, there is an added concern that evidence of the officer's relationship with defendant may end up revealing defendant's prior criminal history. The court therefore adopted certain precautionary procedures when officers provide opinion identification testimony.

When the State seeks to introduce such evidence, the circuit court should permit the defendant to examine the officer outside the presence of the jury so he may explore the officer's level of familiarity as well as any bias or prejudice. When the officer testifies, he may identify himself as a member of law enforcement, but to establish familiarity he should only testify about how long he knew defendant and how frequently he saw him.

Additionally, the court should instruct the jury before the testimony and in the final charge that it need not give any weight to such testimony and that it should not draw any adverse inference from the witness's status as a law enforcement officer.

Here the State introduced lay opinion identification testimony from four witnesses, three of whom were law enforcement officers. The Supreme Court held that the testimony of the three officers was not properly admitted, but the testimony of the civilian witness was proper.

(a) Deputy Sheriff Sandusky interrogated defendant after he was arrested and viewed a video and still image of a man stealing anhydrous ammonia from storage tanks. Sandusky testified that defendant was the person in the images. The court held that Sandusky gained a familiarity with defendant during his interrogation, an interaction that was "in a more natural setting" than the jury would have had from its limited exposure to defendant in the courtroom. Sandusky was thus more likely to correctly identify defendant than the jury. But

the trial court failed to employ the precautionary measures required for law enforcement witnesses and thus Sandusky's testimony was improper.

(b) Officer Jackson also identified defendant from the video and still image. But there was no evidence about how long he knew defendant or how often and under what circumstances he had seen him. There was thus no evidence demonstrating any basis for concluding that Jackson was more likely to correctly identify defendant than the jury. And the trial court failed to employ any precautionary measures prior to his testimony. Accordingly, Jackson's testimony was improper.

(c) Officer Huff was able to identify defendant from the video and still image based on his "previous dealings" with defendant. The court held that Huff had "a perspective of defendant that the jury did not have" and thus was more likely to correctly identify him. But his testimony was inadmissible because the court did not employ any precautionary procedures before admitting his testimony.

(d) Jessica Joslin identified defendant from the still image. She had never met or spoken to defendant, but she once saw him sleeping on the front porch of a mutual friend's house when she was "strung out on methamphetamine." The court held that "although close" there was a sufficient basis to conclude that she was more likely to correctly identify defendant than the jury. And because Joslin was not a law enforcement officer, the trial court did not have to employ any precautionary procedures. Joslin's testimony was thus admissible.

Although the court found that the testimony of the three officers was inadmissible, it held that the error was harmless. Defendant's conviction was affirmed.

People v. Taylor, 2011 IL 110067 Photographs and videotapes may be introduced as substantive evidence if a proper foundation is laid. Such evidence is frequently admitted under the "silent witness" theory, which provides that no witness need testify concerning the accuracy of an image depicted in the photograph or videotape so long as the accuracy of the process that produced the evidence is established by an adequate foundation.

As a matter of first impression, the court found that the Appellate Court appropriately considered several factors in determining whether there had been a proper foundation for the admission of a VHS tape under the "silent witness" theory, including: (1) the device's capability for recording and general reliability; (2) the competency of the operator; (3) the proper operation of the device; (4) a chain of custody showing the manner in which the recording was preserved; (5) an identification of the persons, locale or objects depicted; and (6) an explanation of any copying or duplication process. The court stressed, however, that no list of factors is exclusive, and each case must be evaluated under all of the circumstances. The dispositive issue in determining whether a proper foundation was established is whether the process that produced the recording was shown to be accurate and reliable.

Here, the Appellate Court erred by finding that the State failed to establish a sufficient foundation to admit a VHS tape which had been made from the hard drive of a surveillance camera. The court found that although the system might not have worked perfectly, the mere fact that a recording existed showed that it did work to some extent. The fact that portions of the recording were incomplete did not bar its evidentiary use so long as the defects were not so substantial as to render the entire recording untrustworthy.

Because the officer who set up the surveillance camera testified that he determined that it was working properly, and the videotape made from the surveillance video allowed the defendant to be identified, there was sufficient evidence to show that the system was working properly.

The court rejected the Appellate Court's finding that the VHS tape was inadmissible because the State failed to give an explanation of the process by which the data from the hard drive of the surveillance system was copied to the VHS cartridge. The court noted that a police report stated that the officer "made a copy of the video surveillance on the hard drive, specifically the segment where [defendant] was in [the complainant's office], onto a VHS tape." Where a court is addressing preliminary questions, including the admissibility of evidence, it need not follow the usual rules of evidence and may consider hearsay or other evidence which would be inadmissible if offered to a jury. Thus, the Appellate Court erred by refusing to consider the report on the ground that it was not "evidence."

The court also concluded that the report provided a sufficient explanation of the copying process to establish that the process was reliable. The court did not indicate whether the police report had been admitted at trial or was merely contained in the common law record.

For similar reasons, the court found that the Appellate Court erred by finding that the State failed to show a sufficient chain of custody to make the VHS tape admissible. The same police report stated that the officer made the VHS tape and then locked the tape in his desk "to be later locked in an evidence locker." In addition, a strict proof of chain of custody is not necessary if there are other factors demonstrating the authenticity of the recording. Finally, gaps in the chain of custody go to the weight of the evidence rather than its admissibility.

The Appellate Court also erred by finding that the VHS tape was inadmissible because the State failed to preserve the original recording on the hard drive of the surveillance system. The Supreme Court concluded that the "original" of data stored in a computer or similar device is a printout or other output that is "readable by sight, shown to reflect the data accurately." Thus, the VHS tape, which was created by copying data stored on the hard drive of the surveillance system, constituted an "original." The State was not required to bring the surveillance system into court to show the video that was recorded on the hard drive.

Finally, the Appellate Court erred by finding that the State failed to establish that there had been no alterations, deletions or changes during the process of copying the data from the surveillance system to the VHS cartridge. In many cases, alteration of the image may be necessary to prevent the introduction of irrelevant, unimportant, prejudicial, or privileged information. As a general rule, editing renders evidence inadmissible only if it affects the reliability or trustworthiness of the recording. Otherwise, editing goes only to the weight of the evidence.

Thus, a videotape is inadmissible only if the editing shows that the recording was tampered with or fabricated. Here, there was no such showing, as the officer who made the tape testified that the recording on the VHS tape was the same as the one he watched on the original surveillance system.

The court concluded that the totality of the evidence showed that the State laid a proper foundation for the admission of the VHS tape. Thus, the court did not abuse its discretion by admitting the tape.

People v. Henderson, 142 Ill.2d 258, 568 N.E.2d 1234 (1990) The trial court did not abuse its discretion in allowing the State to introduce color photos of the murder victim at the crime scene and at the morgue:

> "If photographs are relevant to prove facts at issue, they are admissible and can be shown to the jury unless their nature is so prejudicial and so likely to inflame the jurors' passions that

> their probativeness is outweighed. . . . Among the valid reasons for admitting photographs of a decedent is to prove the nature and extent of injuries and the force needed to inflict them; the position, condition, and location of the body; the manner and cause of death; to corroborate a defendant's confession; and to aid in understanding the testimony of a pathologist or other witness. And while such photographs may be somewhat cumulative of the testimony of a witness, such as a police officer who described the condition and location of the body, they may also aid jurors in understanding this testimony."

See also, **People v. Heard**, 187 Ill.2d 36, 718 N.E.2d 58 (1999); **People v. Redd**, 135 Ill.2d 252, 553 N.E.2d 316 (1990); **People v. Kitchen**, 159 Ill.2d 1, 636 N.E.2d 433 (1994); **People v. Newbury**, 53 Ill.2d 228, 290 N.E.2d 592 (1972).

People v. Fierer, 124 Ill.2d 176, 529 N.E.2d 972 (1988) Photos of the murder victim, taken in the autopsy room, were properly admitted at trial where the photos were taken after the body was cleaned of blood and before any autopsy procedure had begun, the photos did not show any autopsy incisions and permitted a clear view of the victim's wounds, and, though the cause of death was not disputed, issues of self-defense and defendant's mental state were vigorously contested. See also, **People v. Heard**, 187 Ill.2d 36, 718 N.E.2d 58 (1999) (autopsy photos were properly admitted where the prosecution used them to question the medical examiner, the examiner used the photographs to explain her findings of the victims' injuries and causes of death, and the photos were relevant to the manner of the victims' deaths and the State's theory that defendant had acted out of revenge); **People v. Lindgren**, 79 Ill.2d 129, 402 N.E.2d 238 (1980) (photos of the deceased at the crime scene were properly admitted because they were probative of the cause of death and amount of force used and tended to corroborate the testimony of the pathologist and other witnesses); **People v. Henenberg**, 55 Ill.2d 5, 302 N.E.2d 27 (1973) (photos of the decomposed body of the deceased were properly admitted where the photos showed the condition of the body as it was found and corroborated testimony as to the cause of death and the identity of the victim); **People v. Foster**, 76 Ill.2d 365, 392 N.E.2d 6 (1979) (color photos of decedent's decaying and dismembered body were properly admitted because they were probative of the time and manner of the homicidal death and the circumstances of concealment of the death); **People v. Walcher**, 42 Ill.2d 159, 246 N.E.2d 256 (1969) (photos of the deceased were properly admitted at a bench trial because they were helpful in showing the location of the bullet entrance wounds, illustrated the testimony of the pathologist, and were used on cross-examination of defendant to impugn his version of the shooting); **People v. Kubat**, 94 Ill.2d 437, 447 N.E.2d 247 (1983) (enlarged color photos of the murder victim were properly admitted because they were relevant to show the nature, extent, and location of the wounds). But see, **People v. Garlick**, 46 Ill.App.3d 216, 360 N.E.2d 1121 (5th Dist. 1977) (the State's use of a gruesome color photograph of the deceased's massive head wound was "needlessly prejudicial"; in view of defendant's admission of the offense and his defense of insanity, the photograph was not probative of any material issue and "could serve no purpose other than to inflame and prejudice the jury in the grossest manner").

People v. Henenberg, 55 Ill.2d 5, 302 N.E.2d 27 (1973) Photographs of the deceased were not necessarily cumulative merely because there was oral testimony concerning the same issues. See also, **People v. Gerecke**, 45 Ill.App.3d 510, 359 N.E.2d 1178 (4th Dist. 1977).

People v. Lefler, 38 Ill.2d 216, 230 N.E.2d 827 (1967) Photographs showing autopic incisions, and those which are made gruesome by autopsy procedure, are not admissible.

People v. King, 29 Ill.2d 150, 193 N.E.2d 790 (1963) Before a photograph is admitted into evidence, the opposing party is entitled to cross-examine the witness who provided the foundation for it.

People v. Donaldson, 24 Ill.2d 315, 181 N.E.2d 131 (1962) In order for a photograph to be admitted into evidence it must be identified by a witness as a portrayal of certain facts and verified by such witness, based upon personal knowledge, as a correct representation of those facts at the time relevant to the issues. The witness need not be the photographer and need not know the time or circumstances of the taking of the photograph, but he must have personal knowledge of the scene or object in question and must testify that it is correctly portrayed by the photograph. See also, **People v. Cheek**, 93 Ill.2d 82, 442 N.E.2d 877 (1982); **People v. Holman**, 103 Ill.2d 133, 469 N.E.2d 119 (1984) (a police officer was properly allowed to testify that the man depicted in a certain photo was defendant where the officer had an opportunity to observe defendant before trial and in the courtroom). But see, **People v. Beverly**, 63 Ill.App.3d 186, 379 N.E.2d 753 (1st Dist. 1978) (photo purportedly depicting defendant was improperly admitted into evidence because no one testified that the person depicted was defendant).

Illinois Appellate Court

People v. Colone, 2024 IL App (1st) 230520 The admission of 13 gruesome photographs of the victims' decomposing and maggot-infested bodies was not plain error. Although defendant argued that the photographs were superfluous because cause of death was not at issue, and pointed out that a similar photograph was found too prejudicial for admission in **People v. Coleman**, 116 Ill. App. 3d 28 (1983), the appellate court disagreed. The photographs served the purpose of showing how the bodies were discovered and their condition as well as the nature of the injuries and damage caused by both the gunshots and the maggots while the bodies remained in the woods. Unlike in **Coleman**, the images were relevant to establish the effects of the maggots on the gunshot wounds as necessary for the medical examiner to determine the path of the bullets and injuries.

People v. Daigle, 2024 IL App (4th) 230015 The State laid an adequate foundation for admitting a disk containing child pornography videos downloaded by defendant's computer. An investigator testified that he used computer software which continuously searched a file-sharing network to identify files known to depict child pornography. Upon locating such files, the software would download them automatically. Here, the software identified and downloaded three such files, which were then linked to defendant's IP address. The downloaded video files were copied to a disk, which the investigator testified was a fair and accurate copy. The trial court did not abuse its discretion in admitting the disk into evidence at defendant's child pornography trial.

People v. Reynolds, 2021 IL App (1st) 181227 The trial court did not abuse its discretion in finding that the State laid an adequate foundation for admission of recorded jail phone calls under the silent witness theory. The State presented testimony about how the automated call system worked and how the records of such calls were maintained and retrieved. While the phone call system did not use a voice recognition feature, the process

was sufficiently reliable to establish a reasonable likelihood that the calls were made by defendant, and that defendant was the male voice heard on the recordings of those calls.

People v. Stitts, 2020 IL App (1st) 171723 The trial committed plain error when it admitted police identification testimony without abiding by the rules set forth in **People v. Thompson**, 2020 IL App (1st) 171723. At trial, the State published a surveillance video while a detective was on the stand. The detective explained the video to the jury as they watched, identifying defendant as having the man shown on the screen with a handgun. Because the trial court did not allow the defense to conduct preliminary cross-examination on the officer's familiarity with the defendant, limit the testimony before the jury (rather than allow the detective to mention prior investigative alerts), and instruct the jury, it plainly violated **Thompson.**

The court also found the evidence closely balanced. No eyewitnesses identified defendant as the shooter, and although he was found nearby with a gun and residue on his hand, the State did not establish that he actually fired, rather than simply held, the gun.

People v. Brand, 2020 IL App (1st) 171728 The trial court erred when it admitted a photograph of complainant's car keys and allowed a police officer to testify that he took the photograph after the keys were recovered from defendant. The officer had no firsthand knowledge of the recovery of the keys, and his testimony that they were recovered during a custodial search was not corroborated by anyone actually present for the search. Thus, the chain of custody was deficient. However, the error was harmless because the complainant's testimony was sufficient to convict the defendant, and the keys were not necessary to corroborate her claim that defendant took the keys from her person, stole her car, and later contacted her to let her know where he left the car.

People v. Tatum, 2019 IL App (1st) 162403 Trial court did not err in allowing autopsy photos into evidence. Although the cause and manner of death were not disputed, relevance does not require that the evidence tend to prove only disputed facts at trial. The State may offer evidence tending to prove any essential fact, even if that fact is not disputed. While the court initially found that the photos should not be published to the jury during the trial, defense counsel's closing argument made the photos relevant to the theory of defense and therefore the court did not err in sending them back to the jury room during deliberations.

People v. Ziemba, 2018 IL App (2d) 170048 Adhering to its recent opinion in **People v. Gaciarz**, 2017 IL App (2d) 161102, the Appellate Court held that a conviction for involuntary sexual servitude of a minor under 720 ILCS 5/10-9(c)(2) does not require that an actual minor be involved. Defendant's conviction of involuntary sexual servitude of a minor, under facts similar to those in **Gaciarz**, was affirmed.

Additionally, defendant's testimony that he intended to engage in sexual activity with an adult, rather than a minor, was belied by the text messages he exchanged with an undercover officer leading to the encounter. On that basis, defendant's solicitation conviction was affirmed.

Finally, the Appellate Court held that a transcript of the text messages was properly admitted. Text messages are documentary evidence, and proper foundation requires only that they be identified and authenticated. The Appellate Court rejected the assertion that text messages are computer-generated records because text messages necessarily require human input; they are not automatically generated records of the internal operations of a computer itself.

Here, the undercover officer testified that the transcript was an accurate record of the entire exchange of messages between himself and defendant. The same set of text messages was found on defendant's phone after he was arrested. And, defendant's actions of going to a specific hotel room and tendering a prearranged amount of money were consistent with his having received the instructions provided in the text exchange. The Appellate Court concluded that a proper foundation was laid for admission of the text messages.

People v. Gaciarz, 2017 IL App (2d) 161102 Defendant responded via text message to an online prostitution advertisement he found on backpage.com. Unbeknownst to defendant, the ad had been placed by an undercover police officer. In the text exchange, the officer posed as the "mother" of two "daughters" available for sex for money. Defendant asked for a picture, and received the response, "I don't send pics, too risky cause of mygirls age." Defendant said he was interested in one hour, and the "mother" asked, "which girl u want, i got a 14 yo blnd and 15 yo brunette." Defendant responded, "brunette" and that he wanted "kisses and bj." The "mother" told defendant he would have to wear a condom and directed him to a specific hotel and room.

The hotel hallway and room were under video surveillance. The recording of the hallway was continuous, but the recording in the room contained several unexplained gaps. The reason for the in-room video malfunction could not be determined. The parts that were recorded showed defendant and another undercover officer posing as the "mother" in the room. Defendant asked to see the girls. After a 33-second gap in the video, defendant handed something from his pocket to the "mother" who confirmed that defendant wanted a "full hour." Defendant agreed and stated that he brought "protection." The police then entered the room and arrested defendant.

Defendant argued that he was not proved guilty beyond a reasonable doubt of involuntary sexual servitude of a minor, traveling to meet a minor, and grooming because the undercover sting operation did not involve an actual minor, person pretending to be a minor, or even a photograph of a minor. While evidence that defendant conversed with a person posing as a minor is relevant, the lack of existence of a purported minor does not preclude the State from proving an essential element of the charged offenses. The sufficiency of the evidence turns on whether defendant intended to commit a specific offense and whether he did anything that constituted a substantial step toward that offense. Here, defendant's text messages were compelling evidence of his culpable mental state, and his arrival at the meeting place with money and condoms constituted a substantial step.

The court also held that the video recording was properly admitted, analogizing its unexplained gaps to a partially inaudible sound recording. Such recordings are admissible unless the missing portions are "so substantial as to render the recording untrustworthy as a whole." Further, even if the recording was admitted in error, it was not so prejudicial as to warrant a new trial. Defendant's convictions were affirmed.

People v. Sangster, 2014 IL App (1st) 113457 A sound recording is admissible if a proper foundation is laid establishing the authenticity and reliability of the recording. Under the silent witness theory, a recording may be admitted without testimony from a witness who personally knows what the recording portrays, if there is proof of the reliability of the process that produced the recording.

Defendant argued that the State failed to lay a proper foundation for the introduction of a phone call he made from Cook County jail since there was no testimony about the capability of the devices used for recording the call, the competency of the operators, or the proper preservation of the recordings. The court rejected this argument, holding that the

ability of defendant to make the call provided sufficient evidence that the system worked properly.

An employee of the jail testified at the admissibility hearing that when an inmate enters the jail he is registered into the jail's telephone system. Before an inmate can place a call, he must give his personal identification number (PIN) and state his name. The system has a voice recognition capability, so his voice must match his previously recorded voice before the system will activate. If the system does not recognize the voice associated with the PIN, the inmate cannot place a phone call. Inmate calls are recorded "as a mater of course.

The court held that with these procedures in place, the ability of defendant to make the call provides sufficient evidence that the system was working properly, and hence shows that the process that produced the recording was reliable. The court noted that defendant never made a colorable claim that the recording was not authentic or accurate. Where a defendant fails to present evidence of tampering or substitution, the State only needs to establish a probability that those things did not occur. Any deficiencies go the weight, not the admissibility, of the evidence.

People v. Thompson, 2014 IL App (5th) 120079 A witness who did not personally observe the events in question may identify, as lay opinion testimony, a defendant depicted in a video or photograph so long as the witness was better able than the jury to make an identification. To determine whether such evidence is admissible courts must find that: (1) the witness was familiar with defendant prior to the offense; and (2) the testimony will aid the jury in resolving the issue of identification without invading the duties of the trier of fact. Testimony will properly aid the jury and not invade its duties where a defendant's appearance has changed between the time of recording and the date of trial, and/or the video or photograph is unclear and the testimony will help describe or interpret the unclear depiction.

Here, four witnesses identified defendant as the person depicted in the surveillance video and still photograph derived from the video. Each witness was familiar with defendant prior to the offense. But there was no evidence defendant had changed his appearance prior to trial, and none of the witnesses had a better perspective than the jury to interpret the evidence.

Although the still photograph was blurry, none of the witnesses who identified defendant described any particular features or aspects of defendant that would have aided the jury in interpreting the unclear depiction. The jury was able to compare both the video (which presented a clear depiction) and the distilled image against defendant, who was present in court, and there is no basis for concluding that the witnesses could make a more informed assessment of who was depicted in the surveillance evidence. The introduction of this identification testimony was thus improper.

The identification testimony was also improper as police procedure evidence. The consequential steps in a police investigation are generally relevant to explain the State's case to a jury. The State must be allowed to explain why a previously unidentified defendant became a suspect. But here none of the identification testimony explained how defendant became a suspect since he had already been identified before any of the police witnesses viewed the surveillance video. The identification testimony thus did not assist the jury in understanding the steps of the investigation or how defendant became a suspect.

Even if this identification testimony had been admissible, the cumulative impact of calling four witnesses to each offer their opinion of who was depicted in the surveillance video would have run the risk of improperly supplanting the function of the jury. Even when admissible, trial judges should limit the amount of such evidence. Here, the four identifications "painted multiple layers of prejudice on the images presented to the jury."

Given the singular role of surveillance evidence, a conviction obtained following the introduction of cumulative identification testimony cannot be trusted. The cause was remanded for a new trial.

People v. Sykes, 2012 IL App (4th) 111110 Under the silent-witness theory, a videotape may be introduced as substantive evidence so long as a proper foundation is laid. It is not necessary for a witness to testify to the accuracy of the images depicted in the video so long as the accuracy of the process used to produce the evidence is established. This is because the evidence is received as a so-called silent witness and thus speaks for itself.

When a lay witness provides opinion testimony, the witness's testimony in the form of opinions or inferences is limited to those which are: (a) rationally based on the perception of the witness; (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue; and (c) not based on scientific, technical, or otherwise specialized knowledge.

Lay opinion testimony is not objectionable because it embraces an ultimate issue to be decided by the trial of fact, but it should be excluded when it consists of inferences and conclusions that can be drawn by the trier of fact.

Whether it is proper for a witness to narrate the contents of a video of which he has no personal knowledge is a legal issue involving no exercise of discretion, fact finding, or evaluation of credibility. Therefore, the issue is subject to *de novo* review.

A surveillance video that was of very poor quality and was difficult to watch was admitted as substantive evidence and thus spoke for itself. A witness who had no personal knowledge of the events at issue testified that the video depicted defendant removing money from a cash register. This testimony invaded the province of the jury because the witness was in no better position than the jury to determine what the video depicted.

People v. Crenshaw, 2011 IL App (4th) 090908 A partially inaudible sound recording is admissible, and any gaps in the recording are relevant only to the weight of the evidence, unless the inaudible portions are so substantial as to render the recording untrustworthy as a whole.

The circuit court did not abuse its discretion in admitting a cell phone recording of an alleged sexual assault that was not of good quality, but which the court had found was "more audible than not." The court relied on the partially audible recording only to determine that the complainant was in distress and that someone was whispering to her. The testimony of the complainant and her mother, and not the recording, supplied the evidence that the defendant was the person whispering in the recording. The court also considered the mother's reaction after listening to the recording – she immediately packed up her family and left the home they shared with defendant.

People v. Dennis, 2011 IL App (5th) 090346 There are two ways in which a foundation to admit a visual recording may be provided. A traditional foundation occurs where a witness can authenticate the content of the recording by testifying that the recording accurately represents what he or she personally saw or heard when the event portrayed by the recording occurred. When a foundation is provided in this way, additional authentication such as a chain of custody is unnecessary.

Alternatively, the court can admit a recording as substantive evidence based on a foundation which establishes the recording's authenticity by other means. Under the "silent witness" theory, a recording may be admitted without the testimony of an eyewitness to the event if there is sufficient proof that the process which produced the recording was reliable.

Under this method, the proponent of the evidence must show the capability of the device for recording, the competency of the operator, the proper operation of the device, the preservation of the recording without changes, additions or deletions, and the identification of the persons, locale or objects depicted sufficiently to make a clear showing that the recording is relevant. This method of showing foundation implicitly includes preservation of a chain of custody and an explanation of any copying which shows that during the process there were no changes, additions, or deletions.

Without fully explaining its holding, the court concluded that the State provided a sufficient foundation, under the "silent witness" theory, to admit a surveillance tape and three still photographs created from the tape. After an armed robbery was reported, a crime scene investigator went to the scene. He then asked the owner of the security company which had installed the security system to come to the store. The investigator and the security company owner watched the videotape at the store. At the request of the investigator, the security company owner burned two copies of the tape on CD's. The investigator took one of the CD's to his office and labeled it to show the date and the name of the person who had created it.

The court noted the failure of the defense to claim that the recording was not authentic or accurate, and held that in the absence of actual evidence of tampering the State is required to show only a probability that no tampering, substitution, or contamination occurred.

Defendant's conviction for armed robbery was affirmed.

People v. Flores, 406 Ill.App.3d 566, 941 N.E.2d 375 (2d Dist. 2010) Videotape and photographic evidence may be admitted at trial for one of two purposes. First, a tape or photograph may be admitted as demonstrative evidence, to illustrate a witness's testimony. A foundation for the demonstrative use of a videotape is established by the testimony of a witness with personal knowledge of the photographed object that at the time relevant to the issue, the videotape is a fair and accurate representation of the object. When a tape is used as demonstrative evidence, the fact that it has been edited goes to weight rather than admissibility.

Where a videotape is admitted as substantive evidence, by contrast, an adequate foundation requires a showing that the original videotape has been preserved without change, addition or deletion. If a copy of the tape is introduced, there must be an explanation of the copying process which satisfies the court that there were no changes, additions or deletions in the exhibit that was admitted at trial. Due to the ease with which digital images can be manipulated with modern editing software, the State may be required to show a chain of custody which shows that the image has not been altered.

At defendant's trial for driving with a suspended or revoked license, a witness testified that a video which he took was an accurate portrayal of the defendant's actions at the time of the offense. However, the witness also admitted that the exhibit was a copy of the original tape and that he had erased images which concerned personal matters unrelated to the offense. Because the exhibit was not the original tape but an edited copy, and because the witness "seemed to go out of his way to obscure the process by which he produced" the exhibit and made "reconstructing the process . . . a matter of guesswork," the exhibit was admissible only as demonstrative evidence. Because the trial court abused its discretion by relying on the tape as subjective evidence, the conviction for driving with a revoked or suspended license was reversed and the cause remanded for a new trial.

People v. Decaluwe, 405 Ill.App.3d 256, 938 N.E.2d 181 (1st Dist. 2010) The defendant was charged with armed violence, aggravated kidnaping and attempt aggravated criminal sexual

assault, in that he demanded that the 14-year-old complainant take nude photographs of him. Five-year-old photographs of the defendant's naked torso taken by defendant's wife and of defendant wearing shorts were not relevant and only invited speculation about the character of the defendant, especially given the nature of the charges.

People v. Hebel, 174 Ill.App.3d 1, 527 N.E.2d 1367 (5th Dist. 1988) Photographs may be used as substantive evidence and not merely to corroborate, illustrate, or impeach oral testimony.

People v. Rolon, 71 Ill.App.3d 746, 390 N.E.2d 107 (1st Dist. 1979) Generally, photos of the crime scene should be excluded when they would confuse or mislead the jury. When the conditions in a photo differ from the conditions that existed at the time of the incident, the photo is inadmissible unless the changes can be explained so that the jury will not be confused or misled. See also, **People v. Williams**, 71 Ill.App.3d 547, 390 N.E.2d 32 (1st Dist. 1979) (photo of crime scene was properly excluded because it was taken two years after the incident, at a different time of day, and there was no showing that the conditions depicted were the same as at the time of the incident.

People v. Hawthorne, 60 Ill.App.3d 776, 377 N.E.2d 335 (2d Dist. 1978) A mug shot of defendant was properly admitted into evidence where its purpose was to show how he was first identified by a witness, and not for the purpose of showing an arrest for another offense.

People v. Holt, 7 Ill.App.3d 646, 288 N.E.2d 245 (3d Dist. 1972) There is no distinction, for admissibility, between color photos and black and white photos.

§19-26
Privileged Communications

§19-26(a)
Marital Privilege

Illinois Supreme Court
People v. Trzeciak, 2013 IL 114491 One spouse may testify against another spouse in a criminal case. However, a spouse may not "testify as to any communication or admission made by either [spouse] to the other or as to any conversation between them during marriage, except in cases in which either is charged with an offense against the person or property of the other." (725 ILCS 5/115-16). The purpose of this marital communications privilege, derived from common law, is to promote marital harmony and stability, and thus aid in the preservation of the marriage.

The privilege applies only to communications that are intended to be confidential. There is a presumption that privately made communications between spouses are intended to be confidential, unless it appears from the nature or circumstances that confidentiality was not intended. Nonverbal conduct is privileged only where it is clearly intended as a substitute for an oral communication, *i.e.*, it was intended to convey a message.

Based on case law from foreign jurisdictions, the court concluded that a communication between spouses can be considered "confidential" only where it is a private exchange that would not have been made but for absolute confidence in, and induced by, the marital relationship. If what is said or done by either spouse has no relation to their mutual

trust and confidence as husband and wife, the reason for secrecy ceases. In such cases, the privilege is inapplicable.

Whether a particular communication was made in reliance on the marital relationship depends on the nature and form of the communication and the circumstances immediately surrounding its making. The confidentiality of a communication is a preliminary question of fact to be decided by the trial court.

Testimony that defendant beat his wife, tied her up, tossed her in his truck, and drove to the house of the deceased was not barred by the marital privilege because that nonverbal conduct was not intended to convey a message.

Furthermore, defendant's threat to kill his wife and the deceased was not barred by the privilege because it was not a confidential communication. The court concluded that the threat was not made in reliance on the confidences of the marriage and had no correlation to the mutual trust between defendant and his wife as spouses. It is also evident that defendant intended for his wife to communicate the threat to the deceased, and that it was the type of communication that defendant's wife might have communicated to her family or the police.

In a specially concurring opinion, Justices Theis and Karmeier agreed that the threat did not constitute a confidential communication where it was made with the intent that it be repeated to a third party. However, the concurring justices objected to the creation of a new exception to the privilege for communications that were not motivated by the spouse's reliance on the intimacy, special trust, and affection of the marital relationship. The concurring opinion noted that such an exception is not included in the statutory language of §115-16 and would require courts to consider the "health or status of a marital relationship at the time a communication occurred.

In a dissent from the denial of rehearing, Justices Theis, Kilbride, and Karmeier criticized the majority for creating an exception to the Illinois martial privilege on the basis of foreign authority while ignoring significant foreign case law holding that application the marital privilege does not rest on a judicial determination of the health or worthiness of the marriage at the time the communication was made.

People v. Hall, 194 Ill.2d 305, 743 N.E.2d 521 (2000) Under 725 ILCS 125/6, a husband or wife may testify for or against each other in a criminal case, but may not testify as to "any communication or admission made by either of them to the other or as to any conversation between them during marriage." The privilege applies only to communications and admissions, and not to a spouse's conduct. The holder of the privilege waives it by failing to object at the time of the testimony in question. In addition, because the purpose of the privilege is to promote family harmony rather than to assure the reliability of evidence, admission of testimony in violation of the privilege does not call into question the fundamental fairness of the proceedings.

People v. Foskey, 136 Ill.2d 66, 554 N.E.2d 192 (1990) The evidence showed that defendant's wife became a police informer after she was arrested for possession of heroin. Based upon information she provided to the police, defendant was arrested and heroin seized from his residence.

Before trial, the State filed an *in limine* motion to preclude the defendant from introducing certain letters the wife had written to defendant and certain conversations between the couple. In these communications the wife stated she had fabricated the story against defendant to avoid going to jail on the drug charges pending against her. The trial judge found that the above matters came within the marital privilege and excluded the evidence at trial.

The Supreme Court balanced the defendant's right to confront witnesses against the claim of marital privilege, and held that the defendant's right to confrontation should prevail in this case. First, the content of the letters and conversations "had the clear potential for devastating the credibility" of the wife's testimony. The Court also noted that the "marital privilege was intended to foster marital harmony." Here, this intent would not be served, since the wife had already cooperated with the police and acted against her husband's interests. "Barring the defendant from cross-examining his wife about these communications certainly could not further a legislative policy of preserving and promoting marital harmony."

People v. Sanders, 99 Ill.2d 262, 457 N.E.2d 1241 (1983) The court held that the martial privilege was not violated by the defendant's wife, who testified about a conversation she had with the defendant in the presence of their children, one of whom was 13 years of age. Although this issue was one of the first impression in Illinois, the "great weight of authority [in other states] is that the presence of children of the spouses destroys confidentiality unless they are too young to understand what is being said." Under Illinois law, a conversation between husband and wife is not privileged if it appears that it was not intended to be confidential; thus, conversations in the presence of third parties are not privileged. Here, the record does not indicate that the 13-year-old son "was not old enough or sufficiently bright to understand the conversation at which he was present, particularly inasmuch as the wife's testimony indicates that some of it was directed to him. In these circumstances, the son's presence rendered the conversation ineligible for the protection of the statutory privilege."

People v. Rogers, 348 Ill. 322, 180 N.E. 856 (1932) The privilege as to communications made during existence of a marriage is not terminated by death or divorce. See also, **People v. Dubanowski**, 75 Ill.App.3d 809, 394 N.E.2d 605 (1st Dist. 1979) (confidential communications made during a separation are privileged); **People v. Borchelt**, 46 Ill.App.3d 286, 360 N.E.2d 1187 (5th Dist. 1977) (statements before marriage to future wife were not privileged).

Cole v. Cole, 153 Ill. 585, 38 N.E. 703 (1894) Only communications made during a valid marriage are privileged.

Illinois Appellate Court

People v. Carr-McKnight, 2020 IL App (1st) 163245 During defendant's husband's testimony, the State elicited testimony about two statements made by defendant. The first was a defendant's statement informing her husband that her co-defendant shot somebody. The Appellate Court found no plain error in the admission of this statement because it was made in the presences of defendant's 12 and 10 year-old children. Statements made in the presence of others are not made confidentially and the privilege does not apply. In the case of children, the privilege would apply only if they were too young to understand what was being said. The court declined to apply the privilege where the statement was made in the presence of a 12 year-old.

The second statement involved defendant's admission to her husband that she would like to take responsibility for her co-defendant's crime because she assumed police would show her mercy. The Appellate Court again declined to apply marital privilege, because defendant made similar statements both to her son, and on the witness stand at trial. The court concluded that in light of these repeated statements, defendant could not have meant the statement to her husband to be confidential.

People v. Gliniewicz, 2020 IL App (2d) 190412 When she consented to a search of her cell phone, defendant waived her marital privilege as to communications between her and her husband that were recovered from her husband's phone as well has her own. The record made clear that defendant knew that the search to which she consented would have revealed all of the text messages she had exchanged with her husband, even those she had deleted from her phone. The Appellate Court reversed the trial court's order granting defendant's motion to bar evidence of marital communications. The Appellate Court also declined to review additional arguments presented by the State; those issues had been decided in a previous appeal in this matter, and review was barred by the law-of-the-case doctrine.

People v. Gliniewicz, 2018 IL App (2d) 170490 On interlocutory appeal from the granting of a defense motion *in limine*, the Appellate Court held that the marital privilege applies to text messages between defendant and her deceased husband, an alleged co-conspirator. The Appellate Court rejected the State's argument that 725 ILCS 5/115-16 protects only spousal testimony, not all spousal communications.

The trial court erred, however, in denying the State's request to reopen proofs so that it could admit into evidence a consent-to-search form defendant signed before police searched her cell phone. Such a waiver could potentially expose the communications, and would constitute a waiver of marital privilege. Although the State made its request to admit the document only after the granting of the defense motion, it had a reasonable explanation (the FBI, a federal agency outside of the State's jurisdiction, had control of the waiver), and the defendant was not prejudiced by the late revelation.

People v. Trzeciak, 2012 IL App (1st) 100259 725 ILCS 5/115-16 prohibits testimony by a husband or wife "as to any communication or admission made by either of them to the other or as to any conversation between them during marriage" with limited exceptions involving offenses against each other, spouse abandonment, or offenses against children.

The circuit court ruled that the testimony of defendant's wife that defendant beat her and threatened to kill both her and the murder victim was admissible, notwithstanding the statutory marital privilege, because "the marriage was in shambles," so there was no marital harmony to protect. Also, defendant did not intend for the threats to remain confidential, as he wanted his wife to convey them to the victim to dissuade him from helping her escape from the defendant.

The Appellate Court found that it was "undisputed that communications had between [defendant's wife] and defendant were during their marriage and were made privately." Although their marriage was not harmonious, the legislature did not see fit to require that marital harmony be present to preserve the privilege, even though it is keenly aware of the problem of domestic violence.

The Appellate Court held that the circuit court erred in not excluding the evidence of the abuse and defendant's threats against his wife and the victim. The court noted that the defendant's acts as well as his statements qualified as communications for purposes of the marital privilege, but did not otherwise explain how defendant's acts of abuse were communications.

The admission of evidence in violation of the marital privilege deprives defendant of a fair trial where it contributes to the guilty verdict. There was evidence that days before the victim's murder, he argued with another man over being dispossessed of his vehicle. The murder weapon and the victim's prescription were found in another man's home. Absent the wife's testimony regarding defendant's statements of jealousy of her relationship with the victim, along with his threats against her and the victim, there is limited evidence to support

defendant's conviction. Therefore, the wife's testimony furnishing defendant's motive for killing the victim contributed to the guilty verdict.

Murphy, J., dissented. Defendant's words and actions demonstrated defendant's desire that they be communicated to the victim and not remain confidential. Moreover, the very reason for creation of the privilege did not exist here; there was no marital harmony to protect.

People v. Saunders, 288 Ill.App.3d 523, 680 N.E.2d 790 (4th Dist. 1997) The Court rejected the State's request to adopt a rule that the spousal privilege does not apply to conversations occurring during the course of a joint criminal enterprise. Although such a rule has been adopted in federal cases and by some other states, the plain language of 725 ILCS 5/115-6 does not permit it in Illinois. However, the Court held that the statutory privilege did not apply in this case because defendant's wife acted as his agent. (See §115-6). Because it appeared that the spouse was "merely acting for the benefit of the defendant" and not participating in the offense for her own benefit it "would seem" that the wife was acting as defendant's agent and that the statutory exception would apply.

People v. Gardner, 105 Ill.App.3d 103, 433 N.E.2d 1318 (5th Dist. 1982) A letter written by the defendant to his wife was a privileged communication which remained protected despite the wife's disclosure of the letter's content to a third party.

People v. Burton, 102 Ill.App.3d 148, 429 N.E.2d 543 (4th Dist. 1981) At defendant's trial defendant's wife could testify about defendant's admission that he had sexual intercourse with his stepdaughters. An exception to the marital privilege exists "where the interests of their children are directly involved." See also, **People v. Eveans**, 277 Ill.App.3d 36, 660 N.E.2d 240 (4th Dist. 1996) (child interest exception applies to the interests of any children in parent's custody or control; exception applied where parent was charged with murdering the child).

People v. Rettig, 88 Ill.App.3d 888, 410 N.E.2d 1099 (3d Dist. 1980) The marital privilege does not prohibit one spouse from testifying about the noncommunicative conduct of the other spouse. See also, **People v. Krankel**, 105 Ill.App.3d 988, 434 N.E.2d 1162 (3d Dist. 1982).

People v. Mullinax, 67 Ill.App.3d 936, 384 N.E.2d 1372 (4th Dist. 1979) When one spouse is charged with a crime against the other spouse, the marital privilege cannot be claimed in regard to communications that are relevant to that charge. Thus, a defendant charged with the attempt murder of his wife could not properly claim that threats to her were privileged communications.

People v. McNanna, 94 Ill.App.3d 314, 236 N.E.2d 767 (3d Dist. 1968) Statements made by defendant to his wife in a public tavern, when they were seated at a table with defendant's sister, were not privileged because they were not confidential communications. See also, **People v. Torres**, 18 Ill.App.3d 921, 310 N.E.2d 780 (1st Dist. 1974) (statements made in a factory in presence of co-workers).

§19-26(b)
Attorney-Client Privilege

United States Supreme Court

U.S. v. Zolin, 491 U.S. 554, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989) The attorney-client privilege is aimed at encouraging full and frank communication between attorneys and their clients and to allow clients to make full disclosure to their attorneys of past wrongdoings. However, the privilege ceases to operate at the point where the client's desired advice refers to future wrongdoing — the "seal of secrecy does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime." In camera review may be used to determine whether allegedly privileged communications come within the "crime-fraud exception." Before a court engages in an in camera review at the request of the party opposing the privilege, that party must present evidence sufficient to support a reasonable belief that such review may yield evidence that establishes the exception. See also, Rule 1.6 of the Illinois Rules of Professional Conduct.

Illinois Supreme Court

People v. Radojcic, 2013 IL 114197 The attorney-client privilege protects confidential communications between an attorney and a client. The purpose of the privilege is to encourage full and frank communication, without fear that confidential information will be disseminated to others. The privilege embodies the principle that sound legal advice is dependent on full and frank communication.

The attorney-client privilege is applicable where three conditions are satisfied. First, legal advice of some sort must be sought from a professional legal adviser in his or her capacity as such. Second, the communication must relate to that purpose. Third, the communication must be made in confidence by the client.

The client has the right to raise the privilege and the right to waive it. The attorney-client privilege protects both the client's communications to the attorney and the attorney's advice to the client.

Like all evidentiary privileges, the attorney-client privilege is inconsistent with the search for truth because it prevents the disclosure of evidence that would be relevant and admissible. Thus, the privilege must be "strictly confined within its narrowest possible limits."

The "crime-fraud exception" is one exception to the attorney-client privilege, and is triggered when a client seeks or obtains the services of an attorney in furtherance of criminal or fraudulent activity. The crime-fraud exception focuses on the intent of the client, and not on the legitimacy of the services provided by the attorney. In other words, even where counsel is completely innocent of wrongdoing, "it cannot be the attorney's business to further any criminal object."

Where the crime-fraud exception applies, the attorney-client privilege is inapplicable. However, only conversations that relate to the crime or fraud may be disclosed.

In order for the crime-fraud exception to apply, the proponent of the exception must present evidence which presents a reasonable basis to suspect that the communications in question were in furtherance of a crime or fraud. However, "the best and often only evidence of . . . the exception . . . is the allegedly privileged communication itself," which cannot be disclosed without violating the privilege. To resolve this dilemma, the trial court may conduct *in camera* review of the communications in order to determine whether the crime-fraud exception applies.

To justify *in camera review,* the proponent of the exception must present a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review "may reveal evidence to establish the claim that the crime-fraud exception applies." The evidentiary showing required for an *in camera* hearing is less than the showing ultimately

needed to establish the application of the crime-fraud exception itself. Furthermore, *in camera* review is not required in every case, as the trial court has discretion whether such review is necessary.

Ideally, the *in camera* review should be conducted by a judge other than the judge who is presiding over the matter at which the communications would be introduced. Furthermore, any *in camera* questioning of counsel must be narrowly tailored so that confidential information is not needlessly disclosed.

The State made a sufficient showing of the crime-fraud exception to reverse the trial court's finding that the exception did not apply. The State presented transcripts of grand jury testimony concerning a scheme through which "carefully structured real estate transactions became the vehicles through which [defendant] was able to defraud numerous lenders, as well as the Department of Housing and Urban Development, all the while keeping his name off any documentation."

In addition, the transcripts provided a reasonable basis to conclude that defendant's communications with counsel were in furtherance of the scheme. Even if the communications between defendant and counsel did not directly concern the fraudulent mortgage applications, the criminal scheme was furthered by communications relating to the real estate transactions which were an essential part of that scheme.

The court acknowledged that the transcripts did not reflect any direct conversations between defendant and counsel, but held that the crime-fraud exception may apply to communications between an attorney and a third party on behalf of the client, so long as those indirect communications furthered a fraudulent scheme.

People v. Wagener, 196 Ill.2d 269, 752 N.E.2d 430 (2001) **People v. Knuckles**, 165 Ill.2d 125, 650 N.E.2d 974 (1995), which extended the attorney-client privilege to communications between a defendant and a defense psychiatric expert, expressly distinguished between testifying and non-testifying experts. Under Knuckles, communications between a defendant and a psychiatric expert are protected by the attorney-client privilege "only so long as 'the psychiatrist will not testify and the psychiatrist's notes and opinions will not be used in the formulation of the other defense experts' trial testimony." The attorney-client privilege is waived "with respect to the testimony and reports of those experts who are identified by the defense as witnesses who will be called to testify on behalf of the defendant at trial, or whose notes and reports are used by other defense experts who testify." Because defense counsel disclosed to testifying defense experts a statement defendant made to his attorney, the attorney-client privilege was waived. Therefore, the State did not err by using the statement in cross-examining a defense witness. See also, **People v. Sutton**, 316 Ill.App.3d 874, 739 N.E.2d 543 (1st Dist. 2000) (statements made to a psychiatric expert during a fitness and sanity examination are protected by the attorney-client privilege, at least where the defendant does not call the expert as a witness or raise an insanity defense).

People v. Knuckles, 165 Ill.2d 125, 650 N.E.2d 974 (1995) Defendant was charged with murder in 1984, and was evaluated by Dr. Kyle Rossiter, a psychiatrist retained under a court order obtained by the public defender. Dr. Rossiter took notes of statements defendant made, but did not prepare a written report. After Dr. Rossiter's examination, defense counsel notified the State that the defense did not intend to introduce any evidence of physical or mental examinations or scientific tests. A short time later defendant pleaded guilty and received a 33-year-sentence.

Years later, the defendant was allowed to withdraw her plea. New defense counsel was appointed and several experts were retained to evaluate defendant's mental state at the

time of the offense. Counsel notified the State that the defense would raise insanity and self-defense and disclosed the names, reports and test results of five experts it intended to call at trial. However, the defense did not intend to call Dr. Rossiter, and did not list him as a witness. The State then served two subpoenas on Dr. Rossiter, seeking to obtain written reports of his 1984 interviews.

The Supreme Court concluded that the attorney-client privilege applies to communications between a defendant and a defense expert retained for trial preparation. An expert retained for purposes of trial preparation occupies the same relationship to defense counsel as does an investigator or clerk, to whom the attorney-client privilege clearly applies. Compelling a non-testifying psychiatrist retained by the defense to reveal communications from a defendant might implicate the constitutional right to the effective assistance of counsel.

People v. Williams, 97 Ill.2d 252, 454 N.E.2d 220 (1983) The attorney-client privilege does not extend to the identity of the client "unless he would be prejudiced in some substantial way." Also, the attorney-client privilege does not usually extend to law students. Where the law student was authorized under Rule 711 to appear in court for limited purposes, however, the Court assumed that the privilege would apply.

People v. Knippenberg, 66 Ill.2d 276, 362 N.E.2d 681 (1977) Defendant's statements to a defense investigator came within the protection of the attorney-client privilege. Impeachment of the defendant with statements obtained from the investigator without the knowledge of defendant or his counsel was "prejudicial error of an intolerable character and violated the defendant's constitutional assurance of the effective assistance of counsel." Because this constitutional violation may have contributed to the conviction, the error is not harmless.

People v. Adams, 51 Ill.2d 46, 280 N.E.2d 205 (1972) An attorney-client privilege exists where legal advice of any kind is sought from a professional legal advisor in his or her capacity as such, and the communications relate to the purpose and are made in confidence by the client. Such communication is permanently protected from disclosure by the client or by the legal advisor, except where the protection is waived. See also, **People v. Williams**, 97 Ill.2d 252, 454 N.E.2d 220 (1983).

People v. Speck, 41 Ill.2d 177, 242 N.E.2d 208 (1968) Statements given by a defense witness to a defense attorney are not privileged.

Illinois Appellate Court

People v. Bliefnick, 2024 IL App (4th) 230707 Defendant was convicted of his wife's murder and appealed, raising multiple issues. The appellate court first held that defendant was not denied effective assistance of trial counsel based on counsel's failure to object to the trial court's ordering his wife's attorneys to share their privileged case files with the police before trial and allowing the attorneys to testify at defendant's trial to their private, privileged conversations with his wife. Any objection based on privilege would have failed because defendant lacked standing to assert his wife's evidentiary privilege. This was particularly apparent where the effect of allowing defendant to assert his wife's privilege would have been entirely self-serving, precluding the jury from hearing potentially incriminating evidence against him.

Further, any privilege relating to information relevant to defendant's prosecution for his wife's murder was impliedly waived or excepted from traditional privilege protections. The attorney-client privilege generally survives the death of a client. The court noted, though, that there is an exception for wills, where the theory is that a decedent would waive privilege if she was able, so that her intent as to distribution of her estate could be effectuated. The court applied the same reasoning here. Enforcing the privilege would be of no benefit to the client or the courts, but rather would undermine her interest in the successful prosecution of her killer. The court concluded that defendant's wife would not have asserted her attorney-client privilege in defendant's prosecution for her murder, even if she could have.

The court also concluded that there was no reversible error in allowing various individuals to testify to defendant's wife's hearsay statements under the forfeiture by wrongdoing doctrine. Defendant challenged the evidence on relevancy grounds. Evidence is relevant where it has the tendency to make the existence of any fact at issue more or less probable. The appellate court found that many of the challenged statements were relevant evidence of defendant's motive where the statements detailed the contentious nature of the divorce proceedings between defendant and his wife and described defendant's anger toward his wife.

With regard to defendant's wife's statements regarding her fear of defendant, however, the appellate court found that the trial court erred in admitting them to show the victim's state of mind. Her state of mind was not relevant to any issue in the case. Ultimately, though, the court concluded that any error was harmless because the evidence of defendant's guilt was overwhelming. Thus, there was no reasonable probability the jury would have acquitted defendant even had the contested statements been excluded as irrelevant.

People v. Watson, 2024 IL App (3d) 230357 The appellate court reversed and remanded for a new trial where the trial court erred by allowing the State to access and use an appointed expert's sanity report against defendant. Under **People v. Knuckles**, 165 Ill. 2d 125 (1995), communications to an expert are protected by attorney-client privilege, particularly one who is engaged by the defense in preparation of an insanity defense.

Here, it was defendant who requested the sanity evaluation. The State may not elicit the opinions and notes of a defense expert unless that expert testifies at trial or the expert's notes and opinions are used to aid another expert in reaching an opinion. Defendant had no intention to call the expert as a witness at trial, and her report was not used by the expert whose testimony he did present.

The court rejected the State's assertion that no privilege was created because defendant declined to participate in the sanity interview and thus there were no confidential communications by defendant to the expert. While the expert relied primarily on her prior fitness interviews and reports, she explained that she also considered that defendant was articulate and coherent during their limited interaction at the sanity interview and that he told her that he could not discuss the case with her and knew she believed he was lying. Those observations constituted confidential communications that could not be separated from other bases for the expert's opinion, and thus the entire report was protected by privilege.

Likewise, the fact that the same expert had generated fitness reports earlier in the proceedings did not render her later sanity report discoverable. While those prior fitness reports could be used by the State in countering an insanity defense pursuant to 725 ILCS 5/104-14(a), they did not entitle the State to view the expert's opinion on sanity given that the two determinations require different considerations.

Finally, the State's assertion that had it been denied access to the expert's report, it would have simply requested its own evaluation by the same expert was unpersuasive. The

court found that the State would not have been permitted to retain the same expert because to do so would undermine attorney-client privilege and create a conflict for the expert.

People v. Trutenko, 2024 IL App (1st) 232333 Defendant, an assistant state's attorney, could not claim that his conversations with a fellow ASA, Fangman, were covered by attorney-client privilege. As a general rule, when an attorney represents someone within the same organization in his or her official capacity, that attorney's client is the organization, not the individual.

Defendant was charged by a special prosecutor with official misconduct, obstruction of justice, and perjury, for acts arising from his prosecution of Jackie Wilson in 1989, and his role as a witness in the re-prosecution of Wilson by a special prosecutor in 2020. The charges arose after defendant testified in the 2020 trial. Before that trial, Wilson had sent defendant and the Cook County State's Attorney's Office subpoenas concerning defendant's relationship with the key State witness, Coleman. Coleman had testified at Wilson's first trial that Wilson made a jailhouse confession. Coleman left the country soon after, and could not be located for re-trial despite an exhaustive international search. The parties ultimately presumed him dead and the trial court declared him unavailable. Meanwhile, Wilson's confession had been suppressed, leaving Coleman's testimony as the centerpiece of the State's case against Wilson on re-trial. The defense theorized that his testimony was prompted by a generous plea deal, but given his unavailability, his testimony from the original trial would be admitted as-is. However, defendant testified at Wilson's 2020 trial that he knew the witness was still alive and that he had maintained a relationship with the witness since the original trial. He was the godfather of Coleman's daughter and in fact had received an email from Coleman days earlier. After this testimony, the OSP dropped the charges against Wilson, and brought the instant charges against defendant.

The privileged communications at issue concerned defendant's discussions with Fangman upon their receipt of the subpoenas. Fangman was tasked with responding to the document subpoenas and helped prepare defendant for his testimony in response to the witness subpoena. The State sought to introduce their discussions to prove that defendant withheld material and potentially exculpatory information, and that he lied when he testified that he didn't help Coleman obtain a plea deal, and did not discuss Coleman in his prep session. Defendant moved to bar the statements as privileged, and the trial court agreed. The State filed an interlocutory appeal.

The appellate court held that defendant could not assert the attorney-client privilege because he was not Fangman's client. When an organization's attorney represents or otherwise communicates with an agent of an organization in his or her official capacity, those conversations are privileged, but the privilege belongs to the organization. Therefore, the attorney-client privilege here belongs to the CCSAO, not defendant. This holding is mandated by statutory law: as an ASA, Fangman could only represent a fellow ASA in his official capacity; he could not serve as defendant's personal lawyer. See 55 ILCS 5/3-9005(a)(4). The holding is further guided by the fundamental principles that "a government lawyer's duty is to serve the public's interests, including its compelling interest in exposing official wrongdoing. A public official may not use a government lawyer to shield evidence of his alleged wrongdoing in office from the People themselves, as represented by the criminal process." Because the CCSAO waived privilege, defendant's conversations with Fangman were admissible subject to the rules of evidence.

Defendant argued that Fangman represented him in a personal rather than official capacity because of defendant's exposure to criminal prosecution. But defendant's exposure could not transform the official representation to personal representation. A public official

who seeks private legal advice must hire a private lawyer, and any discussions between them will be fully covered by the attorney-client privilege. But the trial court's finding that the conversations were privileged because defendant *believed* Fangman was his personal attorney ignored the critical distinction between an official attorney and a personal attorney. The record showed that Fangman acted in his capacity as an employee of the CCSAO at all times in his dealings with defendant. Thus, he acted as defendant's official attorney, regardless of whether defendant subjectively believed him to be acting as his personal attorney.

Finally, the appellate court reversed the trial court's ruling that all of Fangman's statements to defendant were inadmissible hearsay. The statements were either questions, or they were statements explaining why he was asking the questions. In either case, the statements were not admitted for the truth of the matter asserted, but rather to provide context for defendant's statements.

People v. Holloway, 2019 IL App (2d) 170551 In a prosecution for violation of bail bond, attorney-client privilege was not violated by allowing State to ask defendant's prior counsel about a phone conversation he had with defendant on the date defendant failed to appear for trial. The call did not involve legal advice or strategy, and it was made by counsel from the courtroom when others were present, so defendant could not reasonably expect it would remain secret. Further, defendant both forfeited and invited the error by not objecting to use of the specific statement in question and by attempting to use the statement to discredit his prior counsel and advance his theory of defense that counsel deliberately did not remind him about upcoming court dates. Finally, even if there was error, it was harmless because there was no reason to think the statement had any impact on the sole contested question at trial, that being whether defendant's absence from the proceedings was willful.

People v. Radojcic, 2012 IL App (1st) 102698 As a general rule, a client has the right to prevent the disclosure in judicial proceedings of communications between the attorney and the client. The client loses the privilege if he seeks or obtains the services of an attorney in furtherance of criminal or fraudulent activity. To defeat the privilege, the party seeking disclosure must show that a prudent person has a reasonable basis to suspect the perpetration or attempted perpetration of a crime or a fraud, and that the communications were in furtherance thereof.

The court may hear evidence *in camera* to determine whether the privilege applies where only the communications themselves show that the privilege does not apply. But before hearing evidence *in camera*, the judge should require the party seeking disclosure to show facts that would support a reasonable belief that an *in camera* review of the materials may reveal evidence to establish the crime-fraud exception.

The trial judge found that the evidence apart from the communications with the attorney did not show that a prudent person would have a reasonable basis to suspect that the communications furthered the attempt to perpetrate crimes or fraud. But the court failed to perform the next step of determining whether the prosecution presented sufficient evidence to support a reasonable belief that the communications themselves could show that defendant lost the privilege by using communications with his attorney to further his attempts to perpetrate crimes or fraud.

The defense argued that the grand jury testimony of witness Patterson did not provide any reason to suspect that the communications between defendant and his attorney furthered attempts to commit crimes or fraud because either defendant communicated with the

attorney through Patterson, or Patterson acted on her own when she told the attorney what to do.

If Patterson acted on her own, only she has the attorney-client privilege, and she waived her privilege by testifying before the grand jury about her discussions with the attorney.

If Patterson merely acted as a conduit for defendant's communications with the attorney, she either acted as defendant's agent, or not as defendant's agent.

If she did not act as defendant's agent, the communications are not privileged as a defendant's voluntary disclosure of information in the presence of a third party who is not the agent of defendant or his attorney is not privileged.

If Patterson acted as defendant's agent, the communications are protected by the privilege, but the crime-fraud exception applies. The communications with the attorney delineated instructions for preparation of documents needed to receive fraudulent loans, even if the attorney did not know about the falsified loan applications and even if he did not himself commit any crime or fraud.

The court reversed the order striking the attorney's name from the State's list of witnesses and remanded for trial.

People v. McRae, 2011 IL App (2d) 090798 Inmates have no legitimate expectation of privacy under the Fourth Amendment in the contents of their jail cells, but they do not knowingly waive the attorney-client privilege with respect to documents retained in their cells simply because there is no reasonable expectation of privacy in those documents under the Fourth Amendment. Inmates retain their Sixth Amendment right to effective assistance of counsel, which includes the ability to communicate privately with their attorneys without interference. Communications made in confidence by defendants to their attorneys are protected from disclosure by the attorney-client privilege. When that privilege is violated, the constitutionality of the conviction depends on whether the violation produced, directly or indirectly, any of the evidence offered at trial.

A letter written by defendant to his attorney was confiscated from his jail cell and turned over to the prosecution. It was not contested that the letter was written to counsel for the purpose of legal advice in anticipation of trial and was intended to be kept confidential. Defendant pleaded guilty after being advised by his attorney that the contents of the letter could be used against him at trial. At a hearing on defendant's motion to vacate his plea, the trial court ruled that defendant's constitutional rights were not violated by confiscation of the letter because the letter was not kept in an envelope marked "legal mail." While this circumstance was possibly relevant to whether the letter was a privileged communication, it did not, in and of itself, amount to a waiver of the attorney-client privilege. After concluding that defendant's plea was void on other grounds, the court directed that on remand an appropriate inquiry be made into all of the circumstances of the seizure of the letter and whether the defendant treated the letter in such a careless manner as to negate his intent to keep it confidential.

People v. Barber, 116 Ill.App.3d 767, 452 N.E.2d 725 (3d Dist. 1983) Defendant's statements to another inmate, who was assisting him in preparing civil litigation, were not privileged. The other inmate was not a "professional legal advisor" and defendant was not his "client."

Sokol v. Mortimer, 81 Ill.App.2d 55, 225 N.E.2d 496 (1st Dist. 1967) An attorney may disclose the confidential communications of a client where disclosure is necessary to protect the attorney's own rights or to defend himself against an accusation of wrongful conduct.

Turner v. Black, 19 Ill.2d 296, 166 N.E.2d 588 (1960) The attorney-client privilege may be waived by the client if the client testifies about the privileged matter. See also, **Newton v. Meissner**, 76 Ill.App.3d 479, 394 N.E.2d 1241 (1st Dist. 1979).

§19-26(c)
Physician and Therapist Privileges

United States Supreme Court
Jaffee v. Redmond, 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996) The Supreme Court held that federal law should recognize a psychotherapist's privilege. Federal Rule of Evidence 501 provides that unless otherwise provided, privileges "shall be governed by the principles of common law" as interpreted by federal courts "in light of reason and experience." The Court concluded that a psychotherapist-patient privilege promotes "sufficiently important interests" that outweigh society's interest in admitting probative evidence. Like spousal and attorney-client relationships, which are protected by privilege, the psychotherapist-patient relationship requires confidence and trust. Indeed, the "mere possibility" that statements made to a therapist might be disclosed is likely to "impede the development of the confidential relationship necessary for successful treatment." Such a privilege serves a public interest by "facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem." The Court held that the federal psychotherapist privilege applies to communications made to licensed social workers, as well as to those made to psychiatrists and psychologists. In modern society, a significant amount of mental health treatment is provided by social workers, especially where the patient is of cannot afford high fees. In addition, the "vast majority" of states extend the psychotherapist privilege to licensed social workers. (Note: Illinois law recognizes a physician-patient privilege (735 ILCS 5/8-802), a privilege for statements made to rape crisis personnel (735 ILCS 5/8-802.1), a privilege for statements made to persons counseling victims of violent crimes (735 ILCS 5/8-802.2) and a therapist-patient privilege (740 ILCS 110/1 et seq.)).

Illinois Supreme Court
People v. Wilson, 164 Ill.2d 436, 647 N.E.2d 910 (1994) Defendant was convicted of three murders and one count of armed robbery, and was sentenced to death. The Court held that the trial court acted properly by refusing to suppress statements defendant made to a mental health counselor. Although Ch. 91½, §801 et. al. requires that communications made to a therapist must be kept confidential, a "homicide exception" permits disclosures relating "directly to the fact or immediate circumstances of the homicide." Defendant's oral statements referred "directly to the facts" of the triple homicide because defendant told the counselor that he knew who was responsible for the murders. In addition, a journal entry made during treatment, which said that defendant "use[d] to be . . . a stick up man," could be "interpreted" as referring to the triple homicide since defendant was under investigation for murder and armed robbery and the "journal entry explained his reasons for committing armed robberies."

People v. Foggy, 121 Ill.2d 337, 521 N.E.2d 86 (1988) The Court upheld the validity of the statutory privilege for communications made by sexual assault victims to rape crisis

counselors. Defendant was not denied due process or the right to confront witnesses by the trial judge's refusal to conduct an in camera inspection of the victim's counseling records; defendant's request was "merely general" and was not supported by any allegations that material useful to the defense at trial was likely to be found in the records. "[B]ecause of the strong policy of confidentiality expressed in [Ch. 110, §8-802.1] and the absence of any indication by the defendant that the victim's communications with the counselor would provide a source of impeachment, we do not believe that the privilege was required to be breached in this case."

People v. Florendo, 95 Ill.2d 155, 447 N.E.2d 282 (1983) The Court held that the disclosure of patient identities does not violate the statutory physician-patient privilege, which limits privileged information to that which is necessary to enable the physician to render professional services. A patient's identity is not required for treatment. Defendant had contended that since his medical center rendered abortion-related services, the disclosure of patient names would inevitably associate them with the treatment received. The Court balanced a patient's confidentiality interest with the public interest in maintaining the grand jury's power to conduct investigations - and held that "the balance should be struck in favor of the public."

People v. English, 31 Ill.2d 301, 201 N.E.2d 455 (1964) The psychiatrist-patient privilege does not apply where a defendant is examined by a court-appointed physician. See also, **People v. Primmer**, 111 Ill.App.3d 1046, 444 N.E.2d 829 (4th Dist. 1983).

Illinois Appellate Court

People v. Bons, 2021 IL App (3d) 180464 In prosecution for predatory criminal sexual assault of a child, trial court erred in admitting evidence that defendant had been diagnosed with chlamydia. Under 735 ILCS 5/8-802, an individual's medical information is privileged unless one of the exceptions applies. Here, the trial court found two exceptions to the physician-patient privilege, specifically subsection 8-802(4) where an action is brought by or against the patient wherein his physical or mental condition is at issue, and 8-802(7) where actions arising from the filing of a DCFS report are at issue.

With regard to subsection 8-802(4), the Appellate Court noted that defendant's physical condition was not, itself, an element of the offense but was "highly probative" of the element of sexual contact. Relevance and probative value alone, however, are not enough to invoke the exception detailed in subsection 8-802(4). And, the State may not put defendant's medical condition at issue for purposes of subsection 8-802(4) merely by alleging defendant had an STD because that would put the State in control of defendant's privilege. The trial court erred in finding the subsection 8-802(4) exception applicable here.

Likewise, the exception in subsection 8-802(7) did not apply. A school counselor filed the DCFS report related to this case, not the medical provider. Defendant independently sought medical diagnosis and treatment unrelated to the filing of the DCFS report, and his medical information was not obtained as part of the DCFS investigation. Subsection 8-802(7) is not so broad as to apply to any individual implicated in a DCFS report.

The Appellate Court went on to find the error in admitting defendant's medical information harmless. While the complaining witness was young, she was consistent in describing the sexual conduct in question, and there was no reasonable probability that defendant would have been acquitted absent the erroneously admitted evidence.

People v. Sevedo, 2017 IL App (1st) 152541 The Illinois Domestic Violence Act prohibits a domestic violence advocate or counselor from disclosing any confidential communication except in cases where the failure to disclose is likely to result in the imminent risk of serious bodily harm or death of another. 750 ILCS 60/227(b). Confidential communication means any communication between a domestic violence victim and a domestic violence advocate or counselor in the course of providing information, counseling, or advocacy. 750 ILCS 60/227(a)(3).

Defendant was in an abusive relationship with her boyfriend and underwent counseling with a domestic violence advocate. When the State charged defendant with armed robbery, the advocate accompanied defendant to court as part of her counseling services. Following the testimony of a State's witness, defendant made a statement to her advocate that threatened the witness. The advocate reported the statement to the police pursuant to the risk of imminent harm exception.

The State later indicted defendant for threatening a public official based on the threat she communicated to her advocate. The State issued a subpoena to the advocate seeking any reports or documents relating to the threat. The advocate moved to quash the subpoena on the ground that the communication was privileged. The trial court ordered the advocate to provide the documents for an *in camera* inspection to determine whether they were covered by the privilege. The advocate refused and the trial court held her in contempt.

The Appellate Court held that defendant's statement was protected by the statutory privilege. The advocate was in court as part of her counseling services and the statute protects all communication between defendant and the advocate "in the normal series of acts or events of providing information, counseling or advocacy." The court rejected the State's argument that the statute only includes communication relating to the subject of domestic violence since there was no such limitation in the statute.

The court also rejected the State's argument that the imminent risk exception applied here. The statute uses the present tense and requires the risk to be imminent, which means that "it is ready to take place," which was clearly not the case here. The court also found nothing in the statute requiring indefinite disclosure when the advocate has earlier revealed the statement under the risk exception.

Finally, the court held that the privilege does not permit the trial court to conduct an *in camera* review of documents claimed to be protected by the privilege. The advocate-victim privilege is absolute in nature and if the subpoena reveals on its face that the documents fall within the scope of the privilege, as was the case here, the trial court need not look any further than the face of the request. On the other hand, if the trial court cannot immediately determine whether the requested documents fall within the privilege, the trial court may evaluate the applicability of the asserted privilege and determine whether an *in camera* inspection is needed.

The Appellate Court upheld the motion to quash the State's subpoena.

People v. Sutton, 316 Ill.App.3d 874, 739 N.E.2d 543 (1st Dist. 2000) The general physician-patient privilege is created by 735 ILCS 5/8-802, which provides that no physician or surgeon:

> "shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient, except . . . in trials for homicide when the disclosure relates directly to the fact or immediate circumstances of the homicide."

In addition to the general privilege of §8-802, 725 ILCS 5/104-14 provides a specific privilege for statements made during fitness and sanity examinations; such statements may not be admitted unless the defendant raises the defense of insanity or drugged or intoxicated condition. The Appellate Court held that the "homicide exception" of 735 ILCS 5/8-802(1)does not apply to statements made during a fitness or sanity examination if the defendant does not raise insanity or drugged or intoxicated condition as a defense.

Therefore, the plain language of §104-14 precluded impeachment of defendant's testimony with statements made during a fitness examination. **People v. Kashney**, 111 Ill.2d 454, 490 N.E.2d 688 (1986), which held that a defendant waives the protection of §104-14(a) by calling a court-appointed psychiatrist to testify in his behalf, was inapplicable where the defense did not call the psychiatrist to testify or introduce the substance of the statements, which came into evidence only through the State's cross-examination.

People v. Gemeny, 313 Ill.App.3d 902, 731 N.E.2d 844 (2d Dist. 2000) Tapes of phone messages defendant left for a mental health counselor who was scheduled to testify against defendant were protected under 740 ILCS 110/10(a), which provides a privilege for communications between a therapist and a recipient of mental health services. The court concluded that because the calls were made to set up counseling sessions, the messages fell within the statute. The purpose of the privilege - to encourage complete candor between the patient and the therapist - is served by protecting all confidential statements, including calls made outside a formal treatment session.

People v. Nohren, 283 Ill.App.3d 753, 670 N.E.2d 1208 (4th Dist. 1996) Merely asking an emergency room nurse whether defendant's blood had been drawn did not violate 735 ILCS 5/8-802; the officer sought only to discover whether tests had been performed, and not to obtain the results of such tests.

People v. Maltbia, 273 Ill.App.3d 622, 653 N.E.2d 402 (3d Dist. 1995) Defendant's car struck a tree as he was attempting to flee police officers who were following him for a speeding violation. Defendant was apprehended and handcuffed, but when he lost consciousness he was taken by ambulance to a hospital, where he "remained largely unresponsive." After a blood test disclosed that defendant had not consumed alcohol, the treating physician ordered a paramedic and a nurse to obtain a urine sample to test for the presence of drugs and possible internal injuries. When the nurse and paramedic removed defendant's clothing to obtain the sample, they found a small blue cloth bag in defendant's underwear. The nurse and paramedic opened the bag and saw what they believed to be marijuana. The bag was given to the police, and defendant was subsequently charged with several drug offenses.

735 ILCS 5/8-802 provides, in part:

"No physician or surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient, except only . . .

(8) to any department, agency, institution or facility which has custody of the patient pursuant to State statute or any court order of commitment."

The Appellate Court affirmed a suppression order. Because the urine sample was required to determine whether defendant was under the influence of drugs or had internal injuries, and because the treating physician testified that he changed his diagnosis after learning of the contents of the bag, the drugs were discovered as the result of a medical procedure that was necessary for diagnosis and treatment.

The exception of §8-802(8) did not apply. Although that exception allows the disclosure of privileged information "to any department, agency, institution or facility which has custody of the patient pursuant to State statute or any court order of commitment," the record did not show that defendant was in the "custody" of the police during the medical examination.

People v. Sagstetter, 177 Ill.App.3d 982, 532 N.E.2d 1029 (2d Dist. 1988) Defendant entered a negotiated guilty plea to aggravated criminal sexual abuse against his stepdaughter, in return for the State's agreement to dismiss another charge and recommend a sentence of probation. The trial judge, however imposed a sentence of four years imprisonment. At sentencing, two letters written by defendant were introduced without any defense objection. Both letters were written to a master clinician of a mental health center, at his request, during defendant's outpatient treatment. The letters described, *inter alia*, a fantasized sexual relationship with defendant's stepdaughter. The trial judge specifically referred to the letters in imposing sentence.

The Court held that because the letters were "therapeutic tools aimed at helping defendant to address his considerable mental problems" and were written at the request of defendant's therapist, they were confidential under the Mental Health and Developmental Disabilities Confidentiality Act (Ch. 91½, §801, et. seq.) Thus, they were inadmissible at the sentencing hearing without defendant's express approval. Counsel's failure "to take the necessary step to assert the therapist - recipient privilege . . . [constituted] ineffective assistance of counsel." Since the letters were "uncorroborated and unduly prejudicial and inflammatory," the result of the sentencing hearing "would likely have been different but for counsel's 'unprofessional errors.'"

People v. Dean, 126 Ill.App.3d 631, 467 N.E.2d 353 (5th Dist. 1984) A doctor's disclosure of the medication prescribed for a patient does not violate the physician-patient privilege.

People v. Dace, 114 Ill.App.3d 908, 449 N.E.2d 1031 (3d Dist. 1983) (aff'd 104 Ill.2d 96, 470 N.E.2d 993 (1984)) Despite the statutory privilege in Ch. 91½, §801 et seq., the mental history of a witness is relevant to his credibility and is a permissible area of impeachment. Thus, if either the witness or the therapist invokes the statutory privilege, the trial court should conduct an in camera hearing to determine what information is relevant to the witness's credibility. See also, **People v. Phipps**, 98 Ill.App.3d 413, 424 N.E.2d 727 (4th Dist. 1981).

People v. Herbert, 108 Ill.App.3d 143, 438 N.E.2d 1255 (1st Dist. 1982) The physician-patient privilege did not protect medical records of a physician subpoenaed by a grand jury, where the patients had signed forms entitled "Authorization for Release of Medical Information."

§19-26(d)
Other Privileged Communications

United States Supreme Court
Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987) Defendant charged with sexual assault against a child was entitled to have the trial judge review, in camera, confidential Children and Youth Services Agency records pertaining to the child for information material to the defense.

Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972) Newsman may be required to disclose evidence and sources to a grand jury. See also, 735 ILCS 5/8-901 et seq. (Illinois statutory privilege for news reporters).

Illinois Supreme Court

People v. McNeal, 175 Ill.2d 335, 677 N.E.2d 841 (1997) 735 ILCS 5/8-803 provides that statements made to a clergyman are not subject to compelled disclosure where the statements were made "in [the clergyman's] professional character or as a spiritual advisor. . . ." The Court held that the testimony of defendant's brother was not protected by the clergyman's privilege where the statements had not been made to the brother in his capacity as a clergyman; it appeared that the brother initiated the conversations, the brother failed to assert any privilege, and the brother said he was unsure of some statements because he was "too upset" to listen.

People v. Burnidge, 178 Ill.2d 429, 687 N.E.2d 813 (1997) Where the trial judge suppressed statements by defendant that had been improperly disclosed, defendant had received "the full measure of relief . . . necessary to vindicate the [clergyman's] privilege." The Court concluded that the trial court did not err by declining to quash the prosecution.

In re Grand Jury, 125 Ill.2d 424, 530 N.E.2d 453 (1988) The Court held that the public accountant privilege (Ch. 111, §5533) does not extend to information furnished to an accountant for the purpose of preparing a tax return. Such information is not confidential because it is anticipated that it will be disclosed to federal and State tax authorities.

In re Special Grand Jury, 104 Ill.2d 419, 472 N.E.2d 450 (1984) A grand jury investigation involved the disclosure of confidential information contained in transcripts of a juvenile proceeding. A reporter who had written an article based on the transcripts testified that he knew who gave him the transcripts but he invoked the reporter's privilege not to disclose the person's identity. Thereafter, upon request by the grand jury, the circuit court granted an application divesting the reporter of his privilege to refuse disclosure. The reporter's privilege (Ch. 110, §§8-901 to 8-909) may be divested where "all other available sources of information have been exhausted and disclosure of the information sought is essential to the protection of the public interest involved."

The Court found that the public interest would be served by ascertaining who had violated the confidentiality of the Juvenile Court Act, but that all other available sources of information had not been exhausted. At least three members of the State's Attorney's Office had possession of the transcripts and were not called before the grand jury, and the transcripts had been given to the Judicial Inquiry Board. See also, **People v. Childers**, 94 Ill.App.3d 104, 418 N.E.2d 959 (3d Dist. 1981).

People v. Williams, 97 Ill.2d 252, 454 N.E.2d 220 (1983) Communications between a defendant and a probation officer are not privileged.

Illinois Appellate Court

People v. Elkins, 2019 IL App (1st) 161798 An attorney may not use the work product privilege to withhold his or her entire file from a former client. Where a defendant retains new counsel during criminal proceedings and signs a written release authorizing her trial file to be sent to successor counsel, prior counsel must turn over “undisputed” portions of that

file. Counsel may still be able to withhold sensitive work product if the court determines it poses a substantial risk of physical harm, intimidation, annoyance, or embarrassment to any person or if the usefulness of disclosure is outweighed by any other factor. To do so, counsel must submit a privilege log, and defendant may then file a motion to compel asking the court to determine whether the withheld materials must be disclosed.

People v. Peterson, 2015 IL App (3d) 130157 735 ILCS 5/8-803 provides:
A clergyman or practitioner of any religious denomination accredited by the religious body to which he or she belongs, shall not be compelled to disclose in any court . . . a confession or admission made to him or her in his or her professional character or as a spiritual advisor in the course of the discipline enjoined by the rules or practices of such religious body . . . , nor be compelled to divulge any information which has been obtained by him or her in such professional character or as such spiritual advisor.

To fall under the clergy privilege, a communication must be: (1) an admission or confession, (2) made for the purpose of receiving spiritual counsel or consolation, and (3) made to a clergy member whose religion requires him to receive admissions or confessions for the purpose of providing spiritual counsel or consolation. The privilege belongs to both the individual making the statement and the clergy member.

In addition, the clergy privilege applies only to admissions or confessions which are made in confidence. The privilege does not apply to communications that are made in the presence of a third person unless that person was indispensable to the counseling activity. Furthermore, the person who made the statement may waive the privilege by communicating the same matters to third parties.

The party which seeks to invoke the clergy privilege bears the burden of showing that all of the elements have been satisfied. The trial court's determination whether the elements of the privilege have been proven will be reversed only if it is against the manifest weight of the evidence.

The court concluded that the trial court did not err by finding that the communication in question was not confidential and that the clergy privilege therefore did not apply. The clergyman testified that the conversation occurred on the patio of a Starbucks and that he asked a third person to observe, although he did not believe that the third party could hear what defendant was saying. Under these circumstances, the trial court's ruling was not contrary to the manifest weight of the evidence.

Defendant's conviction for first degree murder was affirmed.

People v. Thodos, 2015 IL App (2d) 140995 The clergy-penitent statute provides that a clergyman or practitioner of any religious denomination accredited by the religious body to which he belongs, shall not be compelled to disclose in court a confession of admission made to him in his professional character or as a spiritual advisor in the course of the discipline enjoined by the rules or practices of his religion. 735 ILCS 5/8-803. Essentially, under the statute, a clergyman or accredited practitioner cannot be compelled to testify about confessions made to him while seeking spiritual guidance.

At defendant's trial, Robert Sutter and defendant invoked the clergy-penitent privilege claiming that Sutter could not be compelled to testify about an admission defendant made to him when he was acting as defendant's spiritual advisor. Sutter was neither a pastor at his church nor a paid member of the clergy. His formal training in spiritual counseling consisted of speaking with his pastors and being a disciple of "numerous religious people."

The church elders, who were the governing body of the church, made Sutter the leader of a small Bible-study group, and defendant was one of his disciples. The elders also

authorized Sutter to baptize defendant. Defendant eventually made a number of confidential confessions to Sutter. Afterwards, defendant would pray with Sutter and ask for forgiveness, and Sutter would rebuke defendant.

Sutter would often talk and pray with the pastor, assistant pastor, Sutter's wife, defendant's counselor, and other members of the small group about defendant's confessions. One member of the small group was a police officer. When Sutter spoke to the officer about defendant's confessions, the office never indicated that he was speaking to Sutter in his professional capacity as a police officer, and the officer never indicated that Sutter could be called to testify against defendant.

The trial court found that the clergy-penitent privilege applied. It also found that Sutter did not waive the privilege merely because he talked to others about defendant's confessions since he shared that information with the understanding that it would remain confidential.

The State conceded that defendant confessed to Sutter to obtain spiritual guidance. But the State argued that Sutter (1) was not an accredited clergyman or practitioner as defined in the statute, and (2) waived the privilege by discussing the confessions with others.

The Appellate Court rejected both of the State's arguments. First, the court found that Sutter was an accredited practitioner as defined by the statute. The evidence showed that the church elders authorized Sutter to lead a small group and to baptize defendant, and thus accredited Sutter to perform certain activities. Additionally, the church was aware that Sutter, in his role as spiritual advisor, was receiving confessions from defendant since he regularly spoke to the pastor and assistant pastor about defendant's confessions. Nothing in the statute requires the person giving spiritual advice to be ordained or have completed specific religious training. Instead, a practitioner only needs the authorization of his religious organization.

Second, the court found that the privilege was not waived. Even if Sutter waived the privilege by speaking to others, the privilege belongs to both the confessor and the practitioner. There was no evidence that defendant, who also invoked the privilege, ever shared his confessions with anyone but Sutter. And when Sutter shared the information with others in the church, he did so to help defendant spiritually and with the understanding that the confessions would remain confidential.

The Appellate Court affirmed the trial court's ruling that the clergy-penitent privilege applied.

People v. Thomas, 2014 IL App (2d) 121001 Under section 8-803 of the Code of Civil Procedure, the clergy-penitent privilege only applies where disclosure is "enjoined by the rules or practices" of the relevant religious organization. 735 ILCS 5/8-803. The privilege belongs to both the confesser and the clergyman. When the clergyman does not object to testifying about the confession, the burden shifts to the person asserting the privilege to show that disclosure is enjoined by the rules or practices of the relevant religion.

At defendant's trial, the court precluded evidence that another man, N.H., confessed to a jail pastor that he had committed the offense. The trial court ruled that the confession to the pastor was barred by clergy-penitent privilege. The Appellate Court held that trial court erred in excluding this evidence. The record showed that the pastor agreed to testify, so the burden shifted to N.H. to show that the rules of the pastor's religion prohibited disclosure. The pastor, however, testified that the rules of his religion did not prohibit disclosure, and N.H. offered no evidence to the contrary. Under these circumstances, the trial court's decision to bar the pastor's testimony was erroneous.

The Appellate Court specifically rejected the State's argument that the confesser's perception of the privilege should control whether the privilege applies. Nothing in section 8-803 provides that the confesser's perception determines when the privilege applies. Instead, the rules of the pastor's religion control the outcome.

People v. Criss, 294 Ill.App.3d 276, 689 N.E.2d 645 (4th Dist. 1998) Similar to the State's "informant privilege," there is a qualified privilege against disclosure of a "secret surveillance location." The court found that requiring the police to disclose secret surveillance locations would "seriously cripple legitimate criminal surveillance and endanger the lives of police officers and those who allow their property to be used for criminal surveillance."

To overcome the "secret surveillance location" privilege, the defendant must demonstrate a need for disclosure that goes beyond "mere speculation that the information may possibly prove useful." Whether disclosure is required is to be decided by "balancing the public interest in keeping the location secret with the defendant's interest in preparing a defense." The court stressed, however, that even where the defendant is unable to overcome the privilege he is permitted to cross-examine "the police officer's observations with respect to distance, weather and possible obstructions." See also, **People v. Knight**, 323 Ill.App.3d 1117, 753 N.E.2d 408 (1st Dist. 2001) (the court, after noting that Criss concerned a suppression hearing, held that the State at trial should be compelled to disclose the exact surveillance location if that information is "material" to the issue of guilt).

People v. Diercks, 88 Ill.App.3d 1073, 411 N.E.2d 97 (5th Dist. 1980) The Court discussed the clergy privilege (Ch. 110, §8-803), and held that the privilege applies when the communication is made in confidence. The presence of a third party defeats the privilege. See also, **People v. Pecora**, 107 Ill.App.2d 283, 246 N.E.2d 865 (1st Dist. 1969).

§19-27
Scientific Evidence

§19-27(a)
Generally

United States Supreme Court

Bullcoming v. New Mexico, 564 U.S. 647131 S.Ct. 2705180 L.Ed.2d 610 (2011) The Sixth Amendment Confrontation Clause permits introduction of testimonial statements of witnesses absent from trial only where the declarant is unavailable and the defendant has had a prior opportunity to cross-examine. **Crawford v. Washington**, 541 U.S. 36 (2004). There is no forensic-evidence exception to this rule. An analyst's certification prepared in connection with a criminal investigation or prosecution is testimonial and therefore within the compass of the Confrontation Clause. **Melendez-Diaz v. Massachusetts**, 557 U.S. ___, 129 S.Ct. 2527, ___ L.Ed.2d ___ (2009).

To admit a forensic laboratory report certifying that defendant's blood-alcohol level was above the threshold required for aggravated DWI, the State called an analyst from the laboratory who qualified as an expert witness with respect to the gas chromatograph machine used to perform the analysis as well as the laboratory's procedures. The witness had not signed the certificate and had neither participated in nor observed the test on defendant's blood sample. The certifying analyst had been placed on an unpaid leave for an undisclosed reason, and was not called to testify. The court held that this surrogate testimony did not satisfy the Confrontation Clause.

The testimony of the surrogate analyst was not a substitute for the testimony of the certifying analyst. The surrogate could not convey what the certifying analyst knew or observed about the test or the testing process. His testimony could not expose any lapses or lies on the certifying analyst's part, or address the circumstances that led to the certifying analyst's unpaid leave. The surrogate analyst had no independent opinion regarding defendant's blood-alcohol level. The Confrontation Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination. In short, when the State elected to introduce the analyst's certification, the certifying analyst became the witness defendant had the right to confront.

The certified blood-alcohol reports were testimonial. A document created solely for an evidentiary purpose, made in aid of a police investigation ranks as testimonial. That the reports were not sworn to as in **Melendez-Diaz** was not dispositive.

Justice Sotomayor, specially concurring, emphasized that a statement is testimonial if its primary purpose is to create an out-of-court substitute for trial testimony. The formality of the certified report is also an indicator of its testimonial purpose.

Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) Daubert applies not only to "scientific" testimony but to all expert testimony. The specific factors of reliability mentioned in Daubert (i.e., whether a theory or technique can be and has been tested and subjected to peer review and publication; whether with respect to a particular technique there is a high "known or potential rate of error"; whether there are "standards controlling the technique's operation"; and whether the theory or technique enjoys "general acceptance" within the relevant scientific community) are merely descriptive, and not a definitive checklist to determine whether expert evidence is admissible. Instead, **Daubert** requires a "flexible" inquiry that depends on the particular circumstances of the case.

The court also held that on review, the abuse of discretion standard applies to the trial court's determination to admit or exclude expert testimony under **Daubert**. See also, **U.S. v. Scheffer**, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) (**Daubert** was not intended to foreclose per se exclusionary rules for certain types of expert or scientific evidence, such as polygraph evidence).

Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2876, 125 L.Ed.2d 469 (1993) **Frye v. U.S.**, 293 F. 1013 (1923), which bars expert opinion based on a scientific technique unless that technique is generally accepted as reliable in the relevant scientific community, has been superseded in federal prosecutions. Instead, the Federal Rules of Evidence authorize the admission of expert testimony that is reliable and relevant.

A trial judge may consider many factors in deciding whether evidence is reliable. While the acceptance of a scientific technique is no longer a prerequisite to the admission of expert testimony, it is a valid consideration in determining reliability.

Illinois Supreme Court

People v. Prante, 2023 IL 127241 The supreme court affirmed the denial of leave to file a successive petition raising due process and actual innocence claims based on the introduction of forensic bite mark testimony.

At defendant's murder trial, the State introduced two forensic experts who testified that bite marks on the victim were "consistent with" defendant's teeth, and that bite mark analysis is "no different" than fingerprint analysis. The appellate court held that defendant's

due process claim met the cause-and-prejudice test because the bite mark testimony was not subjected to a **Frye** hearing. The supreme court accepted as true defendant's allegation that bite mark forensics have been thoroughly discredited, but it nevertheless reversed the appellate court.

First as to the appellate court's rationale, the supreme court found that the lack of a **Frye** hearing is a violation of common law, not the constitution, and is therefore not cognizable in a post-conviction petition. The court further found the due process claim was not cognizable as presented. While defendant cited the constitutional protection against "conviction based on evidence of questionable reliability," **Perry v. New Hampshire**, 565 U.S. 228 (2012), the supreme court held that this guarantee is usually protected through means other than the due process clause, such as the right to effective counsel, or evidentiary rules. The court conceded that a conviction based on discredited evidence may be raised under the due process clause in cases of "extreme unfairness," but here, the State's experts were fully cross-examined and defendant was able to present his own expert.

Moreover, in Illinois, a due process claim premised on the introduction of false testimony must be accompanied by a showing of State knowledge **People v. Brown**, 169 Ill. 2d 94 (1995). Here, defendant did not allege that the State knew the bite-mark testimony to be false at the time of his trial. While defendant cited federal cases for the proposition that knowledge is not necessary, the supreme court found that in Illinois, the rule adopted in **Brown** must apply.

Defendant's actual innocence claim also failed due to the strength of the remaining evidence. "Even absent the bite mark testimony, the State presented considerable evidence that [defendant] had the motive and opportunity to commit the crime and, most importantly, that he was aware of facts about the crime scene at a time when they could only have been known by someone who participated in the murder." As such, defendant could not show that his new evidence is not so conclusive so as to change the result on retrial.

People v. Deroo, 2022 IL 126120 Defendant challenged the introduction of chemical blood test results at his DUI trial. The results were admitted into evidence pursuant to section 11-501.4(a) of the Illinois Vehicle Code, which allows the admission of chemical blood tests conducted in the course of emergency medical treatment "as a business record exception to the hearsay rule."

On appeal, defendant argued that section 11-501.4(a) conflicts with Illinois Rule of Evidence 803(6), which expressly excludes "medical records in criminal cases" from the business records exception to the hearsay rule. Defendant contended Rule 803(6) should control over section 11-501.4(a) and, therefore, that the results of the chemical blood tests should have been deemed inadmissible hearsay.

After reviewing the history and purpose of the rule's exception, the supreme court decided to amend Rule 803(6) by removing the exception. The court cited its prerogative to depart from the rule-making procedures set forth in Illinois Supreme Court Rule 3 and utilize a case before it as a vehicle to adopt a rule change.

The exception for medical records in Rule 803(6) stemmed from a line of authority that required expert testimony in order to introduce medical diagnoses and opinions. This authority had been codified in section 115-5(c)(1) of the Code of Criminal Procedure in 1963, which excluded medical records from the definition of business records. But its rationale was called into question in 1975, when Federal Rule of Evidence 803(6) included medical opinions and records in its definition of business records, finding them particularly trustworthy. When Illinois adopted rules of evidence in 2010, it adhered to the exception for medical records found in section 115-5(c)(1), though it followed the federal lead on medical opinions, allowing

them as business records. Given that section 115-5(c)(1) was based on a line of authority involving medical opinions that is no long followed, the Supreme Court found it could not justify continued adherence to an exception for medical records.

Thus, Rule 803(6) no longer contains an exception for medical records in criminal cases. Medical records, including the results of chemical blood tests, may be considered business records. The amendment applies to the instant case, and all pending and prospective cases.

People v. McKown, 236 Ill.2d 278, 924 N.E.2d 941 (2010) Illinois follows **Frye v. U.S.**, 293 F. 1013 (D.C. Cir. 1923), which provides that scientific evidence is admissible at trial only if the underlying methodology or scientific principle is sufficiently established to have gained general acceptance in the relevant scientific field. The **Frye** test applies when a "new" or "novel" scientific principle, test, or technique is cited in support of an expert's opinion.

In a previous decision in this case, the court concluded that the results of horizontal gaze nystagmus testing constitutes scientific evidence because the test requires expert interpretation by a trained police officer. (See **People v. McKown**, 226 Ill.2d 245, 875 N.E.2d 1029 (2007)). **McKown I** also held that HGN testing is "novel" for **Frye** purposes, and remanded the cause for a **Frye** hearing to determine whether HGN testing has gained general acceptance as a reliable indication of alcohol impairment.

After considering the results of the hearing on remand, the court concluded that when performed in conjunction with the protocol adopted by the National Highway Traffic Safety Administration, horizontal gaze nystagmus testing has gained general acceptance as a reliable indication of alcohol consumption. However, the results of HGN testing do not, in and of themselves, establish that a particular person is impaired by the consumption of alcohol. Instead, HGN test results are just one factor which may be considered, along with other evidence, in determining impairment.

The court also noted that in a particular case, the trial court might find that HGN evidence is unduly prejudicial compared to its probative value, and may exclude the evidence on that basis.

In the course of its holding, the court noted that "law enforcement" is not a scientific field. Thus, **Frye** would not be satisfied by a showing that within law enforcement circles there is general acceptance of HGN results to show alcohol-induced impairment. The court found that the relevant scientific fields for HGN testing are medicine, ophthalmology, and optometry.

Before the results of HGN testing may be admitted, a foundation must be laid to show that the roadside HGN testing was performed by a properly-trained officer and according to NHTSA standards. A properly trained officer who performed the test in accordance with the NHTSA protocol may testify as an expert concerning the test results, and may use HGN results as part of the basis for an opinion that the defendant was both under the influence of alcohol and impaired.

Here, however, there was no showing in the record that the officer followed the NHTSA protocol in performing the HGN test. Therefore, the trial court erred by admitting the evidence.

The court rejected the State's argument that the issue had been waived; although defendant failed to raise the issue at trial, the State failed to argue forfeiture when the defendant raised the issue in the Appellate Court. "In effect, the State forfeited its ability to argue forfeiture by the defendant." (See also, **APPEAL**, 2-6(a)).

Defendant's conviction was reversed and the cause was remanded for a new trial.

People v. McKown, 226 Ill.2d 245, 875 N.E.2d 1029 (2007) In Illinois, novel scientific evidence can be admitted only if it satisfies the **Frye** test. A court may determine the general acceptance of a scientific principle by holding a Frye hearing and considering evidence, or by taking judicial notice of unequivocal and undisputed prior judicial decisions or technical writings on the subject.

Horizontal gaze nystagmus (HGN) evidence is "scientific evidence," and is therefore subject to the **Frye** standard. HGN, which measures the degree of involuntary jerking of the eyes, is not within the common knowledge of laymen and requires expert interpretation.

In addition, HGN testing is "novel" because courts nationwide have split concerning whether it is a reliable indicator of the use of alcohol.

Most Illinois cases involving judicial notice of the scientific acceptance of HGN testing have relied on **State v. Superior Court (Blake),** 149 Ariz. 269, 718 P.2d 171 (1986), in which the only expert testimony at the **Frye** hearing was presented by the prosecution. Furthermore, in showing that HGN testimony was based on an accepted scientific principle, the prosecution's expert witness in **Blake** relied on the adoption of HGN by the National Highway Transportation Safety Administration and several police departments. Because the actions of NHTSA and the police departments had been based on the expert's own studies, she "in essence referred back to her own conclusions, magnifying the opportunity for error."

The court also noted that courts of other jurisdictions have differed widely concerning the admissibility and reliability of HGN testimony, precluding reliance on such decisions as a basis for finding scientific acceptance. In addition, no Illinois court has held a **Frye** hearing concerning HGN.

The court rejected the argument that it could find HGN testimony to be reliable based on technical writings. Many of the writings offered by the State did no more than state the accepted theory that alcohol consumption may cause HGN, without finding that HGN is a reliable indicator of alcohol impairment when used as a roadside sobriety test. The court also noted the divergence of expert opinion in the field - many writings indicate that the HGN test is "too delicate" to be administered accurately outside a laboratory, and stress that nystagmus can be caused by many factors other than the use of alcohol.

The Supreme Court retained jurisdiction and remanded the cause for a **Frye** hearing. See also, **People v. Basler**, 193 Ill.2d 545, 740 N.E.2d 1 (2000) (the purpose of a **Frye** hearing is to determine whether novel scientific evidence is generally accepted in the relevant scientific community).

In re Commitment of Simons, 213 Ill.2d 523, 821 N.E.2d 1184 (2004) 1. Under Illinois law, the admission of expert testimony is governed by **Frye**, which permits the admission of scientific evidence only if the methodology or scientific principle on which the evidence is based has gained general acceptance in the particular field to which it belongs. "General acceptance" does not mean universal acceptance or that the methodology is accepted unanimously, but only that the underlying method used to generate an expert opinion is reasonably relied upon by experts in the field.

In addition, **Frye** applies only to "new" or "novel" methodology. Methodology is considered "new" or "novel" if it is "original or striking" or does not resemble "something formerly known or used."

The trial court's decision concerning whether an expert witness is qualified to testify and will offer relevant testimony is reviewed for abuse of discretion. However, the trial court's determination whether the **Frye** standard has been satisfied is reviewed de novo. In

reviewing a Frye ruling, a court of review may consider both the trial court record and "appropriate" sources from outside the record.

2. "Actuarial risk assessment," a process by which expert witnesses use various tests to predict the likelihood that a sex offender will re-offend, satisfies **Frye** and therefore is admissible in Illinois courts. The court noted a conflict in Appellate Court precedent concerning whether actuarial science is new and therefore subject to the **Frye** test, but concluded that if **Frye** applies, such an assessment of the likelihood of re-offending satisfies **Frye** because the procedure is generally accepted by professionals who assess sexually violent offenders. In the course of its holding, the court noted that no other state has deemed actuarial risk assessment to be inadmissible, and that in many states such assessments are mandated by either statute or regulation.

Donaldson v. CIPS, 199 Ill.2d 63, 767 N.E.2d 314 (2002) In Illinois, the admissibility of expert scientific testimony is determined by the Frye test, which permits the admission of scientific evidence if the methodology or scientific principle on which it is based is sufficiently established to have gained general acceptance in the particular field in question. The "general acceptance" criteria does not concern the ultimate conclusion of an expert witness, but only the underlying methodology used to generate that conclusion. If the underlying method is reasonably relied upon by experts in the field, the factfinder may consider the opinion despite the novelty of the expert's conclusion.

Methodology need not be accepted unanimously or even by a majority of experts in order to satisfy **Frye**. However, a technique that is experimental or of dubious validity is not "generally accepted."

The **Frye** test does not make the trial judge a "gatekeeper" of all expert opinion testimony. Instead, the trial court is to apply **Frye** only if the principle, technique or test in question is "new" or "novel."

The court rejected the argument that Illinois follows the "**Frye**-plus-reliability" test, which had been adopted by some appellate districts. Under that test, expert testimony is admissible only if the trial court determines both that the technique or methodology in question is generally accepted and that the specific opinion at issue is reliable. Under Illinois law, once a scientific technique is generally accepted, questions concerning the underlying data and the expert's opinion go to the weight of the evidence rather than to admissibility.

People v. McClanahan, 191 Ill.2d 127, 729 N.E.2d 470 (2000) The Confrontation Clause was violated by 725 ILCS 5/115-15, which provided that in drug prosecutions the State could use lab reports as *prima facie* evidence of the identity of a substance, unless within seven days of receiving the report the defense demanded live testimony.

People v. Cruz, 162 Ill.2d 314, 643 N.E.2d 636 (1994) The Court affirmed long-standing Illinois precedent that evidence of bloodhound trailing is insufficiently reliable to be admitted into evidence. See also, **People v. Lefler**, 294 Ill.App.3d 305, 689 N.E.2d 1209 (5th Dist. 1998) (rejecting argument that Illinois precedent prohibiting evidence of bloodhound tracking applies only to bloodhounds but not to "highly educated" German Shepards; the basis for the exclusion is that canine tracking "relies on an instinctive power incapable of human decipher," since no one "really knows, nor can they define, how or why a dog performs in any way on any specific occasion").

People v. Johnson, 114 Ill.2d 170, 499 N.E.2d 1355 (1986) A State expert witness was properly allowed to testify concerning the results of a "neutron-activation analysis" he conducted on bullets recovered from the murder victim and cartridges found in defendant's home. The expert testified that based on the analysis of trace elements, he believed that the bullets recovered from the victim and cartridges found in defendant's home would commonly be found within the same box of cartridges or from another box of the same type that had been manufactured or packaged on or about the same day.

The Supreme Court held that the "neutron-activation analysis" is a "reliable forensic-science technique," and that the test results were relevant to establish as more probable that the bullets from the murder scene were from the same box as the cartridges found in defendant's home.

People v. Jordan, 103 Ill.2d 192, 469 N.E.2d 569 (1984) The trial court did not err by allowing forensic odontologists to testify to the cause of death based on the "pink tooth theory," which holds that if a decedent's teeth appear to be pink, the cause of death was strangulation. The record showed that the study of the "pink tooth phenomenon" was within the witness's field of expertise, neither of defendant's experts testified that the "pink tooth phenomenon" did not exist or was not recognized in the dental community, and the "pink tooth theory" is outside the realm of the knowledge of lay persons."

Illinois Appellate Court

People v. Sturgeon, 2019 IL App (4th) 170035 In a prosecution for possession of a specific quantity of methampetamine within 1000' of a school, a witness's testimony that he did "not necessarily calibrate[ ]" the scale before weighing the substance but that he did "check[ ] it against the known weights" was adequate to support a guilty verdict. Another witness, a forensic scientist, testified to using a similar procedure to check that her scale was weighing properly. Considered in the light most favorable to the prosecution, a rational jury could find that the weight of the substance was proved beyond a reasonable doubt.

As to the element that the possession was within 1000' of a school, the State should have introduced more evidence than a police officer's testimony that he "learned" defendant's residence where the drugs were found was approximately 609 feet from the school. For instance, the officer could have testified to the method he used to determine the distance. But defense counsel did not cross-examine the witness on the matter or argue in closing that the proof of distance was inadequate, and taking the evidence in the light most favorable to the State, defendant was proved guilty beyond a reasonable doubt. Defense counsel was not ineffective for pursuing the all-or-nothing strategy that defendant did not possess the methamphetamine.

People v. Montano, 2017 IL App (2d) 140326 In **People v. Cruz**, 162 Ill. 2d 314, 643 N.E.2d 636 (1994), the Illinois Supreme Court held that bloodhound trailing evidence is inadmissible in Illinois criminal cases to show any factual proposition. However, in **People v. Lerma**, 2016 IL 118496 and **People v. Basler**, 193 Ill.2d 545, 740 N.E.2d 1 (2000), the Supreme Court held that "science is not static" and "methods must exist for reexamining the validity of scientific tests when new information is acquired."

After conducting a **Frye** hearing, the trial court found that human-remains-detector dog evidence is not analogous to bloodhound evidence. In addition, the lower court held that the fact that three human-remains-detection-dogs alerted to a rug which was found buried in an outdoor area of a horse farm was reliable and admissible even though no human remains were ever found.

After extensively discussing the law of Illinois and other jurisdictions and the evidence produced at the **Frye** hearing, the Appellate Court concluded that it need not decide whether alerts by human remains dogs are admissible because any error in this case would have been harmless in view of the overwhelming evidence of guilt.

People v. Thompson, 2017 IL App (3d) 160503 Where an element of the offense was that a certain pneumatic rifle had a muzzle velocity of at least 700 feet per second, an expert failed to lay an adequate foundation for admission of his testimony that the muzzle velocity of 10 shots tested with a chronograph ranged from 714 to 741 feet per second. The expert testified that he had been using a chronograph for 20 years, that the chronograph was the industry standard for testing the velocity of ballistics, and that he had no formal training in measuring ballistic speed. To check the accuracy of his chronograph, the expert tested it against his friends' chronographs and against factory ammunition. He performed such verification within six months of the time he tested the rifle in this case.

The expert also testified that although chronographs can be calibrated, "[y]ou don't calibrate personal chronographs." He stated that he did not know when or if his friends' chronographs had been calibrated, he was unfamiliar with the standards for calibrating chronographs, he did not call the Illinois State Police for guidance because it does not offer velocity testing, he did not send the gun to the Illinois Crime Lab for testing because it could not calibrate a chronograph, and he did not consult any source to determine whether his chronograph was properly calibrated.

Under these circumstances, the expert failed to establish that the chronograph was working properly and that the results of his testing were accurate. In addition, the foundation was insufficient because the expert's reliance on the chronograph was based solely on his personal experience and not on any generally-accepted methodology.

In addition, the circumstances of the testing in this case were insufficient to justify a finding that the results were reliable. The expert testified that he did not place the gun in a fixed position or take into consideration the wind speed and direction or the level of humidity during the test. Furthermore, the expert was unfamiliar with the standards for recording wind resistence during testing with a chronograph.

Because the State failed to present a sufficient foundation for the muzzle speed testing, the trial court erred by admitting the expert's testimony. Defendant's convictions were reversed and the cause remanded for a new trial.

People v. Beck, 2017 IL App (4th) 160654 Section 11-501.4(a) of the Illinois Vehicle Code provides that the results of hospital blood alcohol testing are admissible in evidence under the business records exception where the testing was performed in the regular course of emergency medical treatment and not at the request of law enforcement authorities, and the testing was performed at the lab routinely used by the hospital. It is not required that the blood draw be part of an established hospital protocol, nor is the severity of the defendant's injuries dispositive. It is enough that the treating physician ordered the testing while providing treatment in the emergency room.

Beck had been in a head-on collision with another driver. His physical injuries did not appear particularly severe to the paramedic on the scene, but the nature of the accident was such that there could have been internal injuries. The emergency room doctor ordered the blood alcohol testing during treatment, so the results were admissible under 11-501.4(a).

Over defendant's objection, the State was permitted to present expert testimony on retrograde extrapolation to provide evidence of defendant's blood alcohol level at the time of the accident. The court distinguished this case from **People v. Barnham**, 337 Ill. App. 3d

1121 (5th Dist. 2003), because the expert here had the qualifications and experience that were lacking in **Barnham** and understood the process of alcohol absorption and elimination.

As a matter of first impression in Illinois, retrograde extrapolation was found to be generally accepted in the relevant scientific community as a method of estimating blood alcohol content, thereby satisfying **Frye**. In reaching this conclusion, the court noted that the toxicologist testified that retrograde extrapolation was generally accepted in the field, it had been admitted in several cases previously, other jurisdictions admit and rely on it, and defendant did not direct the court to any case excluding it for lack of general acceptance.

Also, the court found adequate foundation for the retrograde extrapolation evidence offered here. Here, there had been a second blood draw approximately 5.5 hours after the first, and therefore there was an actual elimination rate established. Likewise, defendant's gender, height, and weight were known factors. While some assumptions had to be made in the retrograde extrapolation calculations, they were not so flawed as to be inadmissible.

People v. Fountain, 2016 IL App (1st) 131474 An FBI agent testified for the State as an expert in the field of historical cell site analysis. He testified that when a cell phone is used it communicates with a cell tower. A call detail record is generated showing the time the call occurred and which cell tower was used. The agent testified about the cell towers defendant's phone used, thereby allowing him to give an opinion as to defendant's approximate location at a given time, and hence show that defendant was in the vicinity of the crimes when they occurred.

Defendant argued that a **Frye** hearing should have been held to determine whether historical cell site analysis was admissible. The court disagreed. It held that historical cell site analysis is not the product of new or novel scientific principles. All the expert did in this case was read defendant's cell phone records and transfer that information to a map to show defendant's location. Reading cell phone records and creating a map is not a scientific procedure or technique. Additionally, this type of analysis is not new or novel and has been widely accepted as reliable by numerous courts.

People v. Smith, 2015 IL App (1st) 122306 (modified upon denial of rehearing 11/13/15)

For breathalyzer test results to be admissible, the State must show, among other things, that the breathalyzer machine passed an accuracy test within 62 days of the breath test.

Here the State introduced a letter and report from the Illinois State Police stating that the breathalyzer machine used to test defendant's breath for alcohol had been tested for accuracy within 62 days of defendant's test. The report provided numerical results of the testing, but did not provide any interpretation of those results and did not state whether the machine had passed the accuracy tests.

The court held that the State failed to properly establish that the breathalyzer machine was certified as accurate within 62 days of defendant's test. The letter and report contained raw data but no interpretation of that data, leaving the court with no basis to discern whether the machine performed accurately. In the absence of such evidence, the breathalyzer test results (showing that defendant's alcohol concentration exceeded .08) were improperly admitted.

The court reversed defendant's conviction for driving with an alcohol concentration of .08 or more and remanded for a new trial.

People v. Shanklin, 2014 IL App (1st) 120084 As part of his motion to suppress statements, defendant sought admission of an expert's opinion on defendant's suggestibility to confess

based on the Gudjonsson Suggestibility Scale (GSS), a test designed to identify people who are less resistant to interrogation tactics. The court held a **Frye** hearing and determined that the GSS was not generally accepted in the forensic psychological community and barred the consideration of such evidence at the motion to suppress.

At the hearing, the defense experts testified that the GSS has been around since the mid-1980s and is generally accepted in the relevant field of forensic psychology. They also testified that the GSS has been widely criticized, is not known to many psychologists, and may not be currently used in forensic psychological examinations. The State's expert criticized the GSS as being inaccurate, and stated that she never uses the test because it is not clinically relevant.

On appeal, defendant argued that the trial court erred in conducting a **Frye** hearing since the GSS is not novel. The Appellate Court disagreed holding that although the GSS has been in existence for almost 30 years, the evidence at the **Frye** hearing showed that its acceptance in the field of forensic psychology has been unsettled and thus it remained a novel scientific methodology.

The court also held that based on the evidence adduced at the **Frye** hearing, which showed that the GSS has many problems and has been widely criticized, the defendant failed to show that the GSS is reasonably relied upon by forensic psychologists when examining pretrial detainees with an extensive criminal history to determine whether they understood their Miranda rights and whether their statements were voluntary.

People v. Coleman, 2014 IL App (5th) 110274 Under **Frye**, scientific evidence is admissible only if the methodology or scientific principle is sufficiently established to have gained general acceptance in its particular field. But **Frye** only applies to scientific evidence. If an expert's opinion is derived solely from his observations and experiences, it is not scientific evidence.

Following a **Frye** hearing, the State was allowed to introduce the testimony of an expert linguist who compared and found similarities between written material produced by the offender and written material produced by defendant. Defendant argued that it was error to admit this evidence because the field of authorship attribution was new and more research was needed before it could become a reliable scientific tool.

The court held that this testimony was not scientific and thus was not subject to the **Frye** test. The expert did not apply scientific principles in rendering his opinion. He instead relied on his skill and experience-based observations in pointing out similarities between the written material produced by the offender and defendant, and never gave an opinion about who was the actual author of the offender's writings. The testimony was thus properly admissible.

People v. Cook, 2014 IL App (1st) 113079 Defendant argued that at his trial for involuntary manslaughter arising from the death of his four-month-old son, the trial court erroneously took judicial notice of the general acceptance of shaken baby syndrome (SBS) as a medical diagnosis because no **Frye** hearing has been held in Illinois to determine if an SBS diagnosis has gained general acceptance. The Appellate Court rejected this argument, holding that the State's expert testimony about SBS was not subject to the **Frye** standard because SBS it is a conclusion reached through observations and medical training and not a methodology.

The State's experts were physicians who testified that based on their observations, the injuries that caused death resulted from blunt trauma which exerted severe forces on the brain and were consistent with SBS. These opinions were based on an application of medical

training to their observations. Defendant did not challenge the medical methodology relied upon to reach the experts' conclusions; instead defendant challenged the conclusions themselves.

Because the expert testimony was based on the witnesses' medical knowledge and experience and not on a theory of SBS or any other novel scientific theory, no **Frye** hearing was required.

People v. Floyd, 2014 IL App (2d) 120507 The police arrested defendant for aggravated driving under the influence at around 9:00 p.m., but did not administer a breath test until 10:30 p.m., when her blood alcohol content (BAC) was .069. The prosecution called an expert witness who testified that by conducting a retrograde extrapolation calculation, he determined that defendant's BAC was between .082 and .095 at the time of arrest.

Retrograde extrapolation is a method for determining a person's BAC at an earlier point in time, and is possible because a person eliminates alcohol at a fixed rate. But for the calculation to be valid, the person must be in the post-absorption (elimination) phase when the test is taken, and the amount on time needed to enter that phase depends on the absorption rate, which itself varies depending on a number of factors, such as the type of food and alcohol consumed and the length of time when the drinking occurred.

The prosecution expert admitted that he did not know what defendant ate, what kind of alcohol she drank, or how long she had been drinking. He also admitted that he did not attempt to determine when defendant had entered the elimination phase, but since she had not consumed any alcohol since 7:30 p.m., he was "quite confident" she would be in the elimination phase by the time she was arrested.

The Appellate Court held that the retrograde extrapolation presented in this case, based on a single breath test and done without knowing many of the factors needed to determine whether defendant was in the elimination phase, was insufficient to provide a reliable calculation, thereby significantly diminishing its probative value. The evidence also invited the jury to determine guilt on an improper basis "due to a reaction to a supposedly high BAC rather than proof beyond a reasonable doubt." The prejudicial effect of this evidence thus substantially outweighed its probative value and it should not have been admitted.

The **Frye** test does not prevent a trial court from weighing the probative value of scientific evidence against its prejudicial effect. Even if a particular type of scientific evidence has gained general acceptance, its admissibility in any particular case will always depend on whether its probative value outweighs the risk of unfair prejudice.

People v. Luna, 2013 IL App (1st) 072253 Friction ridge analysis or ACE-V is the method used to match a known print to a latent print. ACE-V signifies the steps in the process: analysis, comparison, evaluation, and verification. The trial court properly took judicial notice that ACE-V is commonly accepted within the scientific community.

Objections to the ACE-V methodology have been uniformly rejected by state and federal appellate courts. ACE-V was criticized in a 2009 report by the National Research Council of the National Academy of Sciences, but those critiques questioning underlying data and an expert's application of generally-accepted techniques go to the weight of the evidence, not its admissibility. The forum for these criticisms is a trial, not a **Frye** admissibility hearing.

The report recognizes that friction ridge analysis can be a valuable tool to identify the guilty and exclude the innocent and does not undermine the otherwise uniform body of precedent rejecting admissibility challenges to print evidence. While the report represents

the views of a segment of the scientific community, it does not represent the views of the entire relevant scientific community, which includes forensic practitioners. General acceptance does not require that the methodology be accepted by unanimity, consensus, or even a majority of experts.

People v. Robinson, 2013 IL App (1st) 102476 At defendant's trial for first degree murder, a firearm examiner testified that cartridge cases found at the scene of the offense had been fired from a weapon used in a robbery that occurred several months earlier. One of the complainants in the armed robbery identified defendant as the perpetrator of that offense.

Defendant contended that tool mark and firearm identification analysis is not generally accepted in the relevant scientific community, and that the expert testimony should therefore have been excluded under **Frye v. United States**, 293 F. 1013 (D.C. Cir. 1923). Alternatively, defendant argued that the court should have conducted a **Frye** hearing to determine whether microscopic firearm comparison is a generally accepted technique within the relevant scientific community.

The trial court denied defendant's request for a **Frye** hearing on the ground that firearm comparison is performed visually and is not a scientific process. The Appellate Court rejected this holding, noting that neither party suggested that tool mark and firearm identification materials are understandable in the absence of expert testimony. In addition, numerous courts have held that tool mark and firearm analysis involve scientific or technical evidence.

Similarly, **Frye** applies only if the scientific principle is "new" or "novel." A scientific technique is new or novel if it is original or does not resemble something already known or used. Without deciding whether tool and firearm analysis is new or novel, the court assumed for the sake of its opinion that **Frye** applies.

A court may determine whether a scientific principle is generally accepted either by holding a **Frye** hearing or by taking judicial notice of unequivocal and undisputed judicial decisions and technical writings. Because the trial court denied defendant's motion for a **Frye** hearing, the court considered the issue as whether general acceptance was demonstrated by judicial decisions and technical writings.

Under Illinois precedent, to decide a **Frye** question on this basis the court must examine the unanimity or division of precedent in Illinois decisions and the unanimity or division of opinion in other jurisdictions. Special emphasis is placed on whether the issue has been thoroughly litigated in the decisions which are examined. In addition, the court may consider the unanimity or division of opinion in the scientific and technical literature on the subject.

Generally, expert testimony concerning firearms has been held to be admissible in Illinois courts. The cases which the defense cited involve not the general question of whether such testimony is admissible, but the more limited question whether the subjective nature of the process allows an expert to testify that beyond a doubt a bullet was fired from a particular weapon. The court also noted that the case law from other states follows the same pattern. Furthermore, although scholarly materials cited by the defendant have raised criticisms of the methodology used here, no court has found those criticisms sufficient to conclude that the methodology is not generally accepted. The court also noted that the trial court precluded the experts from testifying that their opinions were "within a reasonable degree of scientific certainty."

The court concluded that under these circumstances, the trial judge did not err by ruling that the firearm analysis testimony was admissible. Defendant's conviction for first degree murder was affirmed.

People v. Prather, 2012 IL App (2d) 111104 No **Frye** hearing was required to establish the admissibility of evidence of a home pregnancy test because the technology of a home pregnancy test is not new or novel. The basic principle involved has been known since the 1920s and the methodologies involved were developed in the 1970s. The tests have been in wide use for over 30 years.

People v. Tyler, 2012 IL App (3d) 100970 Under Illinois law, evidence of bloodhound tracking is inherently unreliable and so prejudicial that it is not to be admitted into evidence. (See **People v. Cruz**, 162 Ill. 2d 314, 643 N.E.2d 636 (1994)). Here, however, the erroneous admission of bloodhound evidence did not constitute plain error because the evidence of guilt and innocence was not closely balanced and the admission of the bloodhound evidence did not tip the scales of justice against the defendant.

In dissent, Justice Holdridge concluded that the evidence was closely balanced and that the erroneous admission of the bloodhound evidence created an unacceptable risk that the verdict was affected. Justice Holdridge noted that there was no physical evidence showing that defendant was involved in the robbery, defendant did not confess, two co-defendants testified without implicating the defendant, and one of the co-defendants specifically denied that defendant had been involved. The dissent also noted that bloodhound tracking evidence is extremely prejudicial and that the prosecutor compounded that prejudice by eliciting extensive testimony about the dog's training and abilities. In addition, during closing arguments the prosecutor repeatedly stressed that the bloodhound tracked a scent from the scene of the robbery directly to the house where the defendant was found. Under these circumstances, Justice Holdridge would have reversed the conviction and remanded the cause for a new trial.

People v. Jacobs, 405 Ill.App.3d 210, 939 N.E.2d 64 (4th Dist. 2010) One of the foundational requirements for the admission of a breathalyzer-test result is that the machine used was regularly tested for accuracy. A police officer's testimony that the machine was certified as accurate based on logbook entries, offered to satisfy that foundational requirement, were not testimonial. The certifications were not compiled during the investigation of a particular crime and do not establish the criminal wrongdoing of a defendant. They did nothing more than establish that the machine was tested and working properly.

People v. Atherton, 406 Ill.App.3d 598, 940 N.E.2d 775 (2d Dist. 2010) In a prosecution for predatory criminal sexual assault, a child welfare supervisor who worked for a private social services agency testified to the characteristics of child-sexual-abuse-accommodation syndrome that are often observed in children who have been sexually abused.

A **Frye** hearing on the admissibility of evidence of child-sexual-abuse-accommodation syndrome was not necessary. In **People v. Nelson**, 203 Ill.App.3d 1038, 561 N.E.2d 439 (5th Dist. 1990), the court considered numerous scholarly articles on the syndrome and concluded that it was generally accepted in the psychological community that children who have been sexually abused behave differently than those who have not been abused. As this is exactly the underlying basis of the syndrome, the **Nelson** decision supported the determination that evidence pertaining to the syndrome was generally accepted.

The trial court did not abuse its discretion in allowing a child welfare supervisor to testify as an expert regarding child-sexual-abuse-accommodation syndrome, even though she was not a psychologist or expert in the field of psychology. The witness worked with staff members who worked with sexually-abused children. She had a bachelor's degree in law enforcement, a master's degree in human and family resources, and was studying for a doctorate in education. She had worked with victims and offenders as a sexual abuse therapist, and dealt with emotionally disturbed, neglected, and abused adolescents as a child care worker. She was familiar with child-sexual-abuse-accommodation syndrome through reading articles on the subject and her work with children.

Finally, testimony regarding child-sexual-abuse-accommodation syndrome was relevant. Few jurors have sufficient familiarity with child sexual abuse to understand the dynamics of a sexually-abusive relationship. The defense attacked the credibility of the child witness by introducing evidence of her delayed reporting and inconsistencies in her testimony. The syndrome evidence aided the trier of fact in weighing that evidence.

People v. Rohlfs, 368 Ill.App.3d 540, 858 N.E.2d 616 (3d Dist. 2006) Under **People v. Caffey**, 205 Ill.2d 52, 792 N.E.2d 1163 (2001), caller ID evidence is admissible if the evidence shows that the caller ID device was reliable. Reliability is determined on a case-by-case basis, and is shown where testimony establishes that the same phone number always appeared for the same caller.

The reliability of the complainant's caller ID device was shown by testimony that: (1) whenever a friend called, the friend's phone number was displayed on the caller ID, and (2) every time the recipient received a call from a number subsequently traced to defendant's cellblock at the Tazewell County Jail, the complainant heard the same voice.

The reliability of a caller ID device located in the jail's administrative office was shown by testimony that the device was working properly when the case was being investigated, and displayed the number of the phone in defendant's cellblock when a correctional officer made a call to the administrative office from that phone. Such evidence, "while not extensive," was "marginally sufficient" to show reliability.

In re Commitment of Sandry, 367 Ill.App.3d 949, 857 N.E.2d 295 (2d Dist. 2006) Illinois follows a "rather pure version" of Frye, and does not consider the reliability or validity of the theory as a threshold issue in determining whether the evidence may be admitted. Instead, reliability and validity may be raised at trial by the opposing litigant.

The field of penile plethysmography has obtained sufficient acceptance in the relevant scientific field to satisfy Frye. The court found that PPG has a "logical, plausible, common-sense" basis, and that it is reasonable for experts to rely on the test. In addition, the test is widely used, indicating acceptance by a substantial number of persons who work with sex offenders.

The court also noted that the only issue in this case was whether PPG results may be utilized by an expert in forming an opinion about the likelihood of recidivism of a sex offender. Issues such as whether PPG test results could be presented directly to the trier of fact, or whether the prejudicial effect of such evidence would substantially outweigh its probative value, were not raised.

Defendant did not waive his Frye argument although he merely filed a motion in limine, and did not raise an objection at trial when the State attempted to introduce the report of the expert who had relied on PPG testing. Normally, a motion *in limine* is insufficient to preserve an error for review, and a party must also raise an objection when

the disputed evidence is offered at trial. One reason for this general rule is that the evidence at trial may have some bearing on the admissibility of an item of evidence.

Whether evidence satisfies **Frye** does not depend on the evidentiary context in which it is introduced at trial, "at least insofar as it is offered for the same or a sufficiently similar purpose in a latter proceeding." Under these "unique circumstances," there was no need to raise an additional objection at trial after the motion *in limine* was filed.

People v. Glisson, 359 Ill.App.3d 962, 835 N.E.2d 162 (5th Dist. 2005) As a issue of first impression, the Appellate Court held that testimony by police officers who are familiar with the odor of anhydrous ammonia is sufficient to identify a substance as anhydrous ammonia. The court noted testimony that forensic labs will not accept anhydrous ammonia for testing because it is a hazardous substance, and that the officers stated they were familiar with the odor of anhydrous ammonia through their experience as law enforcement officers.

People v. Canulli, 341 Ill.App.3d 361, 792 N.E.2d 438 (4th Dist. 2003) At a trial for speeding, the trial judge erred by admitting evidence based on laser technology without a Frye hearing. The use of Lidar laser technology to measure vehicle speed constitutes novel evidence, requiring a **Frye** hearing.

The trial court erred by taking judicial notice of the result of a previous **Frye** hearing in the same county. Courts are not bound to follow decisions of equal or inferior courts. In addition, the hearing occurred several years previously, involved different parties, was conducted at a sentencing hearing after the defendant pleaded guilty, and involved a different laser system. The record of the hearing indicated that the defendant was unaware that a **Frye** hearing was going to be held, and therefore did not present any evidence. Under these circumstances, the issue of scientific acceptance of laser technology to measure vehicle speed had not been adequately litigated to justify taking judicial notice.

People v. Raney, 324 Ill.App.3d 703, 756 N.E.2d 338 (1st Dist. 2001) To admit an expert opinion based on testing by an electronic or mechanical device, the proponent must show that: (1) the facts in question are a type reasonably relied upon by experts in the field, and (2) the electronic or mechanical device was functioning properly at the time of the testing. Where an expert utilized gas chromatography mass spectrometer test results to determine that a substance was cocaine, but failed to testify that the machine was functioning properly at the time of the testing, the State failed to establish a sufficient foundation to render the expert's opinion admissible.

People v. Davis, 304 Ill.App.3d 427, 710 N.E.2d 1251 (2d Dist. 1999) Under **Frye**, a trial court considering the admissibility of novel scientific evidence must hold a hearing to determine whether the scientific principles on which the evidence rests have gained general acceptance in the relevant scientific community. The proponent of the evidence has the burden to prove that the Frye test has been satisfied.

Where the trial court did not specifically conduct a formal **Frye** hearing, but heard evidence outside the presence of the jury and considered the reliability of the evidence and the degree to which the scientific method is established and accepted, the equivalent of a **Frye** hearing occurred.

People v. Acri, 277 Ill.App.3d 1030, 662 N.E.2d 115 (3d Dist. 1996) Because professionals in the field of arson investigation disagreed on the reliability of an arson investigation dog's

alert to the presence of accelerant where there is no corroborating laboratory evidence, there is no "general acceptance" that uncorroborated alerts are reliable. Thus, the trial court properly excluded the evidence.

People v. Hendricks, 145 Ill.App.3d 71, 495 N.E.2d 85 (4th Dist. 1986) (rev'd other grounds, 137 Ill.2d 31, 560 N.E.2d 611 (1990)) The trial judge properly allowed expert testimony concerning the probable time of death based on "gastric analysis."

People v. Williams, 128 Ill.App.3d 384, 470 N.E.2d 1140 (4th Dist. 1984) Trial court properly allowed dentist with 19 years experience to testify as an expert and to voice opinion that defendant could have made the bite mark on victim's arm because his teeth and dental arch matched the bite mark.

People v. McGee, 88 Ill.App.3d 447, 410 N.E.2d 641 (2d Dist. 1980) The trial judge erred by granting the State's motion *in limine* to prohibit the defense from introducing expert testimony concerning the results of an absorption inhibition test conducted on the vaginal aspirate taken from the complaining witness shortly after the incident. The judge erred by finding that antigen testing was not generally accepted in the scientific community.

Furthermore, the judge's finding that the results of the test would be inaccurate because of the opportunity for contamination was contrary to the manifest weight of the evidence. Although a chemist who did not examine the sample voiced the opinion that contamination was "very likely" because the material had been left unrefrigerated for four months, the chemist who examined the material testified that he found no evidence of "heavy" contamination.

§19-27(b)
Finger and Shoe Prints

Illinois Supreme Court
People v. Cline, 2022 IL 126383 At defendant's bench trial on a charge of residential burglary, the victim testified that he arrived home on the date in question to find his apartment "ransacked" and discovered that several items were missing, including a set of headphones. The headphone case was recovered from the apartment, and a fingerprint examiner testified that he identified a partial print on that case as belonging to defendant. Defendant denied ever being in the area of the burglarized apartment. The circuit court judge found defendant guilty.

In a motion for new trial filed by new counsel, defendant argued that trial counsel was ineffective for not "vigorously cross-examining" the fingerprint examiner to undermine his conclusion that the print belonged to defendant. That motion was denied.

On appeal, defendant challenged the sufficiency of the evidence to convict where the evidence tying him to the offense was one partial fingerprint on a portable object and where the State did not offer evidence that the fingerprint examiner followed accepted methodology where there was no evidence that he had verified his results with another examiner.

Because defendant had not challenged the examiner's methodology and the lack of evidence of verification below, the Court held that it could not now consider "extra-record materials," specifically regarding the ACE-V methodology, that had not been introduced in the trial court.

The Court went on to reject defendant's challenge to the sufficiency of the evidence. The fingerprint examiner had been found qualified to testify as an expert and had explained

the basis for his opinion that the print on the headphone case belonged to defendant. And, the court found the fingerprint examiner's testimony credible, which is a determination which the reviewing court must afford deference. Further, while the print was found on an portable object, the victim testified that he did not know defendant, that his headphones had been in the case in his locked apartment when he left that morning, and that the headphones were missing when he returned. From this evidence, it was reasonable for the judge to conclude that the print had been left during the burglary rather than at some other time. Defendant's conviction for residential burglary was affirmed.

People v. Campbell, 146 Ill.2d 363, 586 N.E.2d 1261 (1992) The Supreme Court rejected the defendant's contention that shoeprint comparison evidence is unreliable as a matter of law, and found that such evidence was properly admitted in this case.

People v. Eyler, 133 Ill.2d 173, 549 N.E.2d 268 (1989) The Supreme Court upheld the use of expert testimony concerning the "superglue" technique of developing latent fingerprints. Two expert witnesses established that the superglue technique is routinely used by the Chicago police department, that those working in the field of print examination and comparison consider the technique reliable, and that the technique is used in other jurisdictions.

People v. Speck, 41 Ill.2d 177, 242 N.E.2d 208 (1968) Fingerprint evidence may be admitted on the testimony of an expert. Qualification of an expert rests largely within the discretion of the trial court.

People v. Hanson, 31 Ill.2d 31, 198 N.E.2d 815 (1964) An expert witness was properly allowed to testify about his examination of a shoeprint found at the crime scene and the defendant's shoe, and to voice the opinion that he could find no dissimilarities between the print and the shoe.

People v. Jennings, 252 Ill. 534, 96 N.E. 1077 (1911) First case to recognize admissibility of fingerprint comparison.

Illinois Appellate Court

People v. Cross, 2021 IL App (1st) 190374 The trial court did not err in admitting the testimony of a fingerprint expert. The witness described scientifically accepted ACE-V methodology and testified that he followed that methodology in evaluating the latent fingerprint recovered in this case. Defendant argued, however, that the ACE-V has four steps, and the witness did not provide explicit testimony regarding his performance of the final verification step, in contrast to his detailed testimony on the analysis, comparison, and evaluation steps. But issues regarding an expert's application of generally accepted techniques go to the weight of the evidence, rather than its admissibility.

People v. Cline, 2020 IL App (1st) 172631 A partial print on a portable object at the crime scene was insufficient to prove defendant guilty beyond a reasonable doubt of residential burglary. The fingerprint examiner did not follow standard analytical procedure where there was no evidence of verification of his findings. This was particularly problematic where there were only nine points of comparison between the partial latent print and the known print. And, the print was the only evidence potentially connecting defendant to the offense. The court reversed defendant's conviction of residential burglary.

In a supplemental opinion issued on denial of the State's petition for rehearing, the court clarified that fingerprint verification is substantive evidence and not merely foundational. The court refused to presume verification based on the absence of evidence to the contrary. It was the State's burden to present verification evidence, and the State failed to meet that burden.

People v. Luna, 2013 IL App (1st) 072253 Friction ridge analysis or ACE-V is the method used to match a known print to a latent print. ACE-V signifies the steps in the process: analysis, comparison, evaluation, and verification. The trial court properly took judicial notice that ACE-V is commonly accepted within the scientific community.

Objections to the ACE-V methodology have been uniformly rejected by state and federal appellate courts. ACE-V was criticized in a 2009 report by the National Research Council of the National Academy of Sciences, but those critiques questioning underlying data and an expert's application of generally-accepted techniques go to the weight of the evidence, not its admissibility. The forum for these criticisms is a trial, not a **Frye** admissibility hearing.

The report recognizes that friction ridge analysis can be a valuable tool to identify the guilty and exclude the innocent and does not undermine the otherwise uniform body of precedent rejecting admissibility challenges to print evidence. While the report represents the views of a segment of the scientific community, it does not represent the views of the entire relevant scientific community, which includes forensic practitioners. General acceptance does not require that the methodology be accepted by unanimity, consensus, or even a majority of experts.

People v. Negron, 2012 IL App (1st) 101194 **People v. Safford**, 392 Ill. App. 3d 212, 910 N.E.2d 143 (1st Dist. 2009), held that an adequate foundation was not laid for the admission of the opinion of a expert witness regarding a fingerprint identification where the expert testified to his conclusion, but provided no testimony as to how he arrived at his conclusion, and was unable to describe what he saw in common between the latent print and the known print.

Characterizing **Safford** as an "outlier case," the Appellate Court concluded that the State had laid an adequate foundation for the testimony of its expert that defendant's print matched the latent print at issue. The expert generally explained the process of fingerprint comparison and went into detail about how he performed the comparison. Although the expert was unable to state what points of similarity he found and how many points of similarity he found, "a technical number of points of similarities is not required in order for such testimony to be admissible." The number of points of similarity affects only the weight of the evidence, not its admissibility.

People v. Mitchell, 2011 IL App (1st) 083143 Under **People v. Safford**, 392 Ill.App.3d 212, 910 N.E.2d 143 (1st Dist. 2009), the trial court errs by admitting testimony of a fingerprint identification where the identifying expert fails to testify concerning the process by which he or she arrived at the conclusion that a latent print matched the defendant's known sample. **Safford** concluded that as part of the foundation for admitting fingerprint evidence, the expert's explanation of the process used to make the comparison must be adequate to permit the identification to be scrutinized.

Safford did not apply where the fingerprint examiner explained the procedure by which she concluded that two latent prints matched the defendant's known prints. The examiner testified that she did a side-by-side comparison of the latent prints on the

defendant's sample, looking for "ridge-type, pattern flow, and things such as this." The examiner stated that she "quickly" found thirteen points of comparison between the latent prints and defendant's known sample, and she demonstrated five specific points of comparison to the jury. The court concluded that under these circumstances, the comparison was sufficiently explained to allow the defense to challenge the identification. Thus, there was a sufficient foundation to admit the fingerprint testimony.

The court also noted that unlike **Safford,** the fingerprint evidence here did not provide direct evidence that defendant had committed the crime with which he was charged.

Defendant's conviction for first degree murder was affirmed.

People v. Safford, 392 Ill.App.3d 212, 910 N.E.2d 143 (1st Dist. 2009) The defendant's convictions for aggravated battery with a firearm and attempt murder were reversed, and a new trial was ordered, because a fingerprint examiner was allowed to testify to his conclusion that a print found at the scene of the crime belonged to the defendant without first offering an adequate foundation of the underlying evidentiary basis for the conclusion.

Crucial to the State's case was the testimony of Brent Cutro, a forensic scientist with 24 years of experience, who testified that a latent fingerprint belonged to the defendant. On direct examination, Cutro explained that in examining fingerprints he generally looks at three levels of detail of each print. On cross-examination, Cutro admitted that he did not note points of comparison, stating that he is among a group of experts that do not base their ultimate opinions on points of comparison. Cutro also stated that he does not make notes concerning his visual examination of prints he is comparing; he merely opines whether there is or is not a match.

At trial and on appeal, the defendant argued that it was improper to allow Cutro to testify only to his "conclusion," without first offering an adequate foundation of the underlying evidentiary basis for the conclusion. A majority of the Appellate Court agreed, noting that admitting expert testimony without a showing of the requisite foundation severely limits effective cross-examination and "so curtails the ability of the defendant to challenge the conclusion drawn by the expert that it leads to a suggestion of infallibility." The court emphasized that it was not overruling previous Illinois authority holding that there is no minimum number of points of similarity needed to establish a reliable fingerprint identification:

[A]lthough the scientific community is divided as to how many points of comparison are needed to make a positive identification, the proffered expert must be subject to challenge on the analysis he undertook to arrive at his conclusion, regardless of the method he followed. Otherwise, the basis for making a positive identification between the latent and exemplar prints is not subject to scrutiny.

Fingerprint evidence is extremely persuasive. A jury may be so swayed by such evidence that strong alibi witnesses have little chance of being found credible when fingerprint evidence points to the defendant being present at the scene of the crime. The persuasiveness of fingerprint evidence reinforces the need to require a proper foundation to establish its admissibility. As our supreme court stated in the context of addressing whether facts and opinions in reports on which a psychiatrist relied in reaching his diagnosis could be disclosed to the jury:

"Absent a full explanation of the expert's reasons, including underlying facts and opinions, the jury has no way of evaluating the expert's testimony and is therefore, faced with a 'meaningless conclusion' by the witness." **People v. Anderson**, 113 Ill.2d 1, 11, 495 N.E.2d 485 (1986).

Justice Wolfson, in dissent, stated that although there was "a disquieting paucity of detail to support Examiner Cutro's opinion," the lack of more substantial foundational

evidence "went to the weight of Cutro's opinions, not their admissibility." Justice Wolfson added that although he had "no desire to denigrate the importance of cross-examination . . . I find no authority that supports the proposition that the lack of detail we find here is devastating enough to bar a qualified and experienced fingerprint examiner's opinions."

People v. Ferguson, 172 Ill.App.3d 1, 526 N.E.2d 525 (2d Dist. 1988) Although an expert may testify about a comparison of a shoeprint with the shoes suspected of making the print, he may not give identification testimony based on an analysis of the shoeprint and the "wear pattern" of defendant's shoes. The theory that "wear patterns" on shoes are unique to the individual wearer is not generally accepted within the scientific community.

People v. Eagle, 76 Ill.App.3d 427, 395 N.E.2d 155 (1st Dist. 1979) Proper foundation was laid for introduction of expert testimony that fingerprints found on can at crime scene were the same as print on defendant's fingerprint card. The State has no obligation to preserve objects from which fingerprints were lifted.

People v. Miller, 20 Ill.App.3d 1061, 313 N.E.2d 660 (4th Dist. 1974) An expert compared fingerprints from the crime scene with a 10-year-old fingerprint card bearing the same name as defendant. Because there was no showing that the person of the name on the card was in fact the defendant, the expert had no basis upon which to identify the prints used for the comparison. Thus, it was error to allow the expert's testimony that the prints at the scene were those of the defendant. Reversed.

§19-27(c)
Polygraph

United States Supreme Court
U.S. v. Scheffer, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) The right to present relevant evidence is not violated by a per se ban of polygraph evidence in military justice proceedings. The ban serves the legitimate governmental interest of insuring that the trier of fact in a criminal trial considers only reliable evidence, and is not "arbitrary" or "disproportionate."

A plurality of the court found that a per se prohibition of polygraph evidence serves two additional governmental interests: (1) preserving the jury's function of making credibility determinations (i.e., preventing the trier of fact from being unduly persuaded by polygraph evidence), and (2) avoiding litigation over collateral issues such as the appropriateness of the test procedures, the qualifications of the examiner, the validity of interpretation of test results, and whether the examinee was able to use countermeasures to distort the polygraph readings.

Illinois Supreme Court
People v. Jackson, 202 Ill.2d 361, 781 N.E.2d 278 (2002) The Illinois prohibition of polygraph evidence applies at bench as well as jury trials. **People v. Jefferson**, 184 Ill.2d 486, 705 N.E.2d 56 (1998) recognizes a limited exception to the rule against polygraph evidence where such evidence is admitted to rebut a defendant's claim that his statement was the result of threats and false promises from the police or prosecution. The Jefferson exception does not apply, however, where the State introduces such evidence before any claim of false promises or threats are raised.

People v. Jefferson, 184 Ill.2d 486, 705 N.E.2d 56 (1998) Under Illinois law, evidence concerning polygraph examinations and results is generally excluded from criminal trials because it is considered unreliable and likely to mislead the trier of fact. In **People v. Triplett**, 37 Ill.2d 234, 226 N.E.2d 30 (1967), however, the court suggested that polygraph evidence might be admissible to determine whether a confession is voluntary, because in that circumstance it is the mere fact of the examination, and not its result, that is relevant.

Where defendant claimed that her inculpatory statement was prompted by promises of leniency, the fact that she agreed to take a polygraph examination was admissible to explain the circumstances surrounding the defendant's inculpatory statement. "Having testified that the statement was made in response to improper inducements by the police, the defendant cannot now be heard to complain about the introduction of rebuttal evidence regarding the circumstances that actually led her to make the statement."

The prosecution did not violate the general rule against polygraph evidence although, before the defendant testified about her reasons for making the inculpatory statement, it presented testimony that an appointment had been made for defendant to see an unspecified "technician." Although the "technician" was in fact a polygraph examiner, the reference was vague and would not have led jurors to speculate that a polygraph examination was involved. See also **People v. Montgomery**, 302 Ill.App.3d 1, 704 N.E.2d 816 (1st Dist. 1998)(the trial court properly admitted evidence that defendant confessed after being told that in the polygraph examiner's opinion, defendant was not being completely truthful; the evidence was admitted only at the hearing on a motion to suppress the statement as involuntary).

People v. Gard, 158 Ill.2d 191, 632 N.E.2d 1026 (1994) The Supreme Court extended several of its prior rulings, which prohibit evidence that a criminal defendant has taken a polygraph examination, to cases in which such examinations are taken by witnesses. Whether the defendant or witnesses are involved, polygraph evidence is inherently unreliable and susceptible to misuse by jurors, who are likely to believe it to be especially probative. Thus, admission of evidence that a witness took a polygraph is reversible error even where no defense objection is raised and even where the defense solicits the testimony.

The Court also held that the introduction of the polygraph evidence was plain error even though the evidence was not close. The plain error rule applies in two situations: where the evidence is closely balanced and where the error threatens the integrity and reputation of the judicial process. The admission of polygraph evidence "imping[es] upon the integrity of our judicial system" and "compromis[es] the integrity and tarnish[es] the reputation of the judicial process," and justifies reversal of the conviction despite overwhelming evidence of guilt.

People v. Melock, 149 Ill.2d 423, 599 N.E.2d 941 (1992) The defendant's due process right to present a defense, which includes the right to explain the circumstances of his confession so that the jurors may weigh its reliability, provides an exception to the general rule barring polygraph evidence where defendant claimed that he confessed because he was falsely told by the polygraph examiner that his examination, which was inconclusive, had established his guilt.

People v. Baynes, 88 Ill.2d 225, 430 N.E.2d 1070 (1981) The results of a polygraph test are not admissible in evidence, even by stipulation. The process of polygraph examinations "has not reached a level of sophistication that makes it generally more probative than prejudicial." See also, **People v. Szabo**, 94 Ill.2d 327, 447 N.E.2d 193 (1983) (not admissible at

sentencing); **People v. Sanchez**, 169 Ill.2d 472, 662 N.E.2d 1199 (1996) (not admissible even under the relaxed rules of admissibility in effect at death penalty sentencing hearings); **Kaske v. Rockford**, 96 Ill.2d 298, 450 N.E.2d 314 (1983) (not admissible at administrative hearings); **People v. Ackerman**, 132 Ill.App.2d 251, 269 N.E.2d 737 (2d Dist. 1971) (not admissible at sentencing); **People v. Reese**, 90 Ill.App.3d 284, 412 N.E.2d 1179 (3d Dist. 1980) (not admissible at a juvenile transfer hearing); **People v. Thomas**, 123 Ill.App.3d 857, 463 N.E.2d 832 (1st Dist. 1984) (prosecutor may not refer to defendant's taking a polygraph test).

Illinois Appellate Court

In re T.R., 2019 IL App (4th) 190529 During cross-examination of respondent, the State, over defense objection, introduced prior inconsistent statements made during a polygraph examination. The trial court overruled the objection, and the Appellate Court affirmed. As a matter of first impression in Illinois, the Appellate Court held that prior inconsistent statements made during a polygraph examination are admissible to the same extent as any other prior inconsistent statement, provided that all references to the polygraph examination are removed.

People v. Matthews, 2012 IL App (1st) 102540 The trial court abused its discretion when it admitted evidence that a prosecution witness took a polygraph exam before making a statement inculpating defendant in a murder, to rebut the testimony of a defense witness that the prosecution witness told her that her statement was coerced by police threats that she would be charged with the murder. The polygraph evidence supported the credibility of the prosecution witness and invaded the province of the jury to resolve conflicts in the evidence and to determine the weight to be given testimony.

People v. Logan, 2011 IL App (1st) 093582 A witness initially denied that defendant was involved in the offense, but subsequently implicated defendant in a statement and in her grand jury testimony. At trial, she denied that defendant had been involved. When questioned about her prior inconsistent statements, she claimed that police had coerced the inculpatory statement and testimony by threatening to charge her with first degree murder.

The Appellate Court concluded that the trial court properly allowed the State to introduce evidence that the inculpatory statement and testimony occurred after the witness took two polygraphs and was confronted with the results. The court noted that the State did not initiate the discussion of the alleged coercion, but merely followed up after the witness alleged coercion. Furthermore, the evidence was admitted only to rebut the claim of coercion; the jury was not informed of the results of the examination, was given a limiting instruction, and was cautioned that it was not to speculate about what the polygraph showed.

People v. Rosemond, 339 Ill.App.3d 51, 790 N.E.2d 416 (1st Dist. 2003) Where the defendant claims that his inculpatory statement was coerced, the State may present polygraph evidence to explain the circumstances surrounding the statement.

Here, the defense did not make a sufficient claim of coercion to trigger the exception to the general rule prohibiting polygraph evidence. Although defendant's father testified that during his son's interrogation a male officer asked defendant about his standing in a gang, "popped his fingers in defendant's face" when defendant denied being in a gang, and stated that he hated the Gangster Disciples, such evidence did not raise a claim of coercion sufficient to "open the door" to polygraph evidence.

The court also stressed that most of the evidence which allegedly raised a claim of coercion was presented not by the defense, but elicited by the State during cross-examination of defense witnesses. "The State is not entitled to erect a strawman of coercion and then burn it with the fire of polygraph evidence."

The court also rejected the argument that a claim of coercion was raised by a defense witness's testimony about the duration of the interrogation. The evidence showed that the interrogation was interspersed with breaks, and there was uncontested testimony concerning defendant's favorable treatment while at the police station. Under these circumstances, "there is little basis to conclude that defendant's statement resulted from the duration of his interrogation."

People v. Finley, 312 Ill.App.3d 892, 728 N.E.2d 101 (4th Dist. 2000) Evidence of polygraph results is generally excluded both because polygraphs are not sufficiently reliable to establish guilt or innocence and because the quasi-scientific nature of the test may cause the trier of fact to give it undue weight. It is also improper to introduce the results of a polygraph examination of a witness other than the defendant or to show that the defendant refused to take a polygraph. However, the fact that a polygraph examination was taken may be admissible, despite the general rule of exclusion, where necessary to explain the circumstances under which a defendant made a statement.

The trial court did not abuse its discretion by denying a mistrial after a police officer testified that defendant refused to take a polygraph. There was no showing the officer acted in bad faith, the testimony was stricken and appropriate instructions given, and the defendant was not substantially prejudiced. See also, **People v. Eaton**, 307 Ill.App.3d 397, 718 N.E.2d 1020 (1st Dist. 1999) (the State may not introduce evidence that a criminal defendant refused to take a polygraph; "[t]hat which may not be accomplished directly by evidence of polygraph test results may not be accomplished indirectly by references to whether a defendant sought, declined, or was offered a polygraph test").

People v. Mason, 274 Ill.App.3d 715, 653 N.E.2d 1371 (1st Dist. 1995) The State violated at least the spirit of the trial court's order excluding polygraph evidence where it introduced testimony that defendant went to the Chicago Police Crime laboratory to talk to a laboratory "technician," that another witness talked to the same "technician," that defendant then talked to the "technician" a second time, and that defendant changed his statements about the offense after the "technician" gave him the "the results of those conversations."

Although the words "polygraph" or "lie detector" were never used, the testimony "successfully signaled to the jury that the defendant had failed a polygraph examination." See also, **People v. Daniels**, 272 Ill.App.3d 325, 650 N.E.2d 224 (1st Dist. 1995) (reversible error occurred when the State presented evidence from which the jury could have inferred that defendant failed a polygraph examination; although the State did not explicitly introduce the results of defendant's polygraph, "[t]he jury would have to [have been] off on some other spinning planet" to avoid inferring that defendant had failed; defendant did not invite the polygraph evidence by questioning the detective about whether the police had coerced defendant while she was in custody).

People v. McClellan, 216 Ill.App.3d 1007, 576 N.E.2d 481 (4th Dist. 1991) After the defendant testified that he changed his story during an "interview" because he decided he wanted to "clear" the situation with police, the State introduced evidence that the "interview" had actually been a polygraph examination and that the defendant changed his story in response to the examiner's statement that defendant was not telling the truth. Although the

jury was instructed that the evidence was admissible only to show why the defendant had changed his story (and not to suggest the results of the polygraph), the jury could easily infer that the test showed that defendant was lying and would likely believe that such evidence was conclusive of guilt. Thus, the rule prohibiting the admission of polygraph evidence was violated.

§19-27(d)
Hypnotically Enhanced Evidence

United States Supreme Court
Rock v. Arkansas, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) A per se rule which excludes all hypnotically refreshed testimony "infringes impermissibly on the right of a defendant to testify in his or her own behalf."

Illinois Supreme Court
People v. Sutton, 233 Ill.2d 89, 908 N.E.2d 50 (2009) Under **People v. Wilson**, 116 Ill.2d 29, 506 N.E.2d 571 (1987) and **People v. Zayas**, 131 Ill.2d 284, 546 N.E.2d 513 (1989), hypnotically induced testimony of a witness other than the defendant is inadmissible. However, testimony about a previously hypnotized witness's pre-hypnotic recollection is admissible if the proponent of the evidence establishes that the testimony is based solely on the independent, pre-hypnotic recall.

Although Wilson and **Zayas** contemplate an evidentiary hearing at which the proponent of such testimony attempts to show that it is based on pre-hypnotic recall, an evidentiary hearing was unnecessary on remand where the extent of the witness's pre-hypnotic testimony was undisputed and the record clearly showed that the testimony was influenced by hypnosis. Furthermore, expert testimony was not necessary to resolve the issue of the admissibility of the witness's post-hypnotic identification of the defendant, because it was clear from the record that the identification was possible only through hypnosis.

People v. Zayas, 131 Ill.2d 284, 546 N.E.2d 513 (1989) The Supreme Court discussed the problems with hypnotically-enhanced testimony and the rules adopted by other states, and concluded:

> "[B]ecause its reliability is suspect, and it is not amenable to verification due to the fact that even experts cannot agree upon its effectiveness as a memory-restorative device, a witness' hypnotically induced testimony, other than that of a defendant [see, **Rock v. Arkansas**, 483 U.S. 44 (1987)], is not admissible in Illinois courts. The fact that information elicited through hypnosis can be corroborated, moreover, does not permit a court to admit it as evidence. . . .
> "[W]e think this rule will enhance rather than hinder [the truth-finding] process. The probative value of any hypnotically enhanced testimony is questionable since most scientists doubt its accuracy."

People v. Wilson, 116 Ill.2d 29, 506 N.E.2d 571 (1987) A witness who undergoes hypnosis is allowed to testify as to his prehypnotic recollection. The proponent of the testimony should establish the nature and extent of the prehypnotic recall, and the parties should be permitted to present expert testimony to explain to the trier of fact the potential effects of hypnosis.

"This approach, which essentially corresponds to that adopted by a number of other States . . . effectively meets the problems associated with hypnosis and its potential influences on a witness' testimony regarding his prehypnotic recollection."

§19-27(e)
Ballistics & Firearms

Illinois Supreme Court

People v. Johnson, 114 Ill.2d 170, 499 N.E.2d 1355 (1986) A State expert witness was properly allowed to testify concerning the results of a "neutron-activation analysis" he conducted on bullets recovered from the murder victim and cartridges found in defendant's home. The expert testified that based on the analysis of trace elements, he believed that the bullets recovered from the victim and cartridges found in defendant's home would commonly be found within the same box of cartridges or from another box of the same type that had been manufactured or packaged on or about the same day.

The Supreme Court held that the "neutron-activation analysis" is a "reliable forensic-science technique," and that the test results were relevant to establish as more probable that the bullets from the murder scene were from the same box as the cartridges found in defendant's home.

People v. Fisher, 340 Ill. 216, 172 N.E. 743 (1930) Although an expert witness may testify concerning ballistics testing, such testimony by a witness other than an expert is improper.

Illinois Appellate Court

People v. Smith, 2023 IL App (1st) 181070 The State committed a discovery violation when it failed to disclose testimony from its expert witness on primer firearm residue ("PGR"). The expert testified, as disclosed in discovery, that a PGR test on defendant's hand was negative. The expert explained that her Illinois State Police lab requires the presence of three chemicals for a positive result, and that only one of these three chemicals was found on defendant's hand. But the State went on to elicit, over objection, the fact that other labs would have considered the test "positive" based on the presence of one chemical. She eventually explained on cross-examination that the ISP lab uses triple the industry standard because a study of 80 tests using the one-chemical standard found a single false positive.

The appellate court first rejected the defendant's argument that the evidence of a one-chemical standard was inadmissible because it was not generally accepted in the scientific community. PGR testing has long been considered generally accepted. An expert's conclusion as to what qualifies as a positive or negative result does not implicate **Frye**, which is concerned with the underlying scientific principle, not the expert's ultimate conclusion.

However, the State violated discovery when it elicited the testimony. The discovery disclosure related to this expert merely stated that she would testify as to her negative finding. Yet the thrust of her testimony was that defendant did in fact fire the gun. Not only did she testify that she discovered the presence of a single chemical that may have led to a "positive" finding in a different lab, she also spent most of her time explaining the many ways in which residue could be removed from one's hands. As in **People v. Lovejoy**, 235 Ill. 2d 97 (2009), the expert's testimony was essentially the opposite of what it purported to be in discovery. This unfairly surprised the defense and precluded an opportunity to prepare a rebuttal.

People v. Rodriguez, 2018 IL App (1st) 141379-B The trial court did not err in denying defendant's motion to exclude ballistics evidence or to subject such evidence to a **Frye** hearing prior to trial. Defendant's motion was based on a scientific study raising concerns about such evidence. In Illinois, ballistics evidence has long been admissible. The scientific study may affect the weight of such evidence, but not its admissibility.

People v. Navarro, 2015 IL App (1st) 131550 The Integrated Ballistic Identification System (IBIS) is a nationwide computerized database that compares ballistic signatures on fired bullets and cartridge casings. Under 725 ILCS 5/116-3(a)(1), a defendant may request IBIS testing on evidence secured for trial that was not subject to IBIS testing. To present a *prima facie* case for IBIS testing, the defendant must show that identity was the issue at trial and the evidence has been subjected to a proper chain of custody. 725 ILCS 5/116-3(b).

The court should permit testing if it "employs a scientific method generally accepted within the relevant scientific community," and "the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence, even though the results may not completely exonerate" him. 725 ILCS 5/116-3(c). Evidence is materially relevant to a claim of actual innocence if it tends to significantly advance that claim.

At trial, three eyewitnesses testified that they saw defendant fire three shots in the direction of the victim. An officer testified that he chased defendant and saw him holding a gun. During the chase, the officer briefly lost sight of defendant before he arrested him. When he was arrested, defendant did not possess a gun. Other officers recovered a loaded gun from a yard near where defendant had been running. Three spent shells recovered from the scene were connected through ballistics evidence to the recovered gun.

Defendant argued at trial that he had been mistakenly identified. He was convicted of first degree murder and eventually filed a *pro se* motion for ballistics testing. The trial court denied his request and defendant appealed, alleging that an IBIS search could show that the gun linked to him was not the murder weapon and therefore produce material evidence of his actual innocence.

The Appellate Court affirmed the denial of defendant's motion, holding that an IBIS search could not produce evidence that would materially advance a claim of actual innocence. At trial, the State produced overwhelming evidence of defendant's guilt, including three eyewitnesses who saw defendant fire the fatal shots, and an officer who saw defendant run from the scene with a gun. None of this testimony hinged on the ballistics evidence the State presented at trial linking the recovered gun to the shooting. Accordingly, the results of any IBIS testimony would be irrelevant.

People v. Robinson, 2013 IL App (1st) 102476 Defendant contended that tool mark and firearm identification analysis is not generally accepted in the relevant scientific community, and that the expert testimony should therefore have been excluded under **Frye v. United States**, 293 F. 1013 (D.C. Cir. 1923). Alternatively, defendant argued that the court should have conducted a **Frye** hearing to determine whether microscopic firearm comparison is a generally accepted technique within the relevant scientific community.

Generally, expert testimony concerning firearms has been held to be admissible in Illinois courts. The cases which the defense cited involve not the general question of whether such testimony is admissible, but the more limited question whether the subjective nature of the process allows an expert to testify that beyond a doubt a bullet was fired from a particular weapon. The court also noted that the case law from other states follows the same pattern.

Furthermore, although scholarly materials cited by the defendant have raised criticisms of the methodology used here, no court has found those criticisms sufficient to conclude that the methodology is not generally accepted. The court also noted that the trial court precluded the experts from testifying that their opinions were "within a reasonable degree of scientific certainty."

The court concluded that under these circumstances, the trial judge did not err by ruling that the firearm analysis testimony was admissible. Defendant's conviction for first degree murder was affirmed.

People v. Singletary, 73 Ill.App.3d 239, 391 N.E.2d 440 (1st Dist. 1979) Expert who examined gun and fatal bullet was properly allowed to testify that the bullet might have been fired from that gun. This testimony was not objectionable on the ground that it was conjecture and speculation.

§19-27(f)
Handwriting

Illinois Supreme Court

People v. Smith, 318 Ill. 114, 149 N.E. 3 (1925) Letters written by defendant were properly admitted for comparison to determine if he had also written an anonymous letter. Comparison must be made by person who is qualified as an expert.

Illinois Appellate Court

People v. Coleman, 2014 IL App (5th) 110274 Following a **Frye** hearing, the State was allowed to introduce the testimony of an expert linguist who compared and found similarities between written material produced by the offender and written material produced by defendant. Defendant argued that it was error to admit this evidence because the field of authorship attribution was new and more research was needed before it could become a reliable scientific tool.

The court held that this testimony was not scientific and thus was not subject to the **Frye** test. The expert did not apply scientific principles in rendering his opinion. He instead relied on his skill and experience-based observations in pointing out similarities between the written material produced by the offender and defendant, and never gave an opinion about who was the actual author of the offender's writings. The testimony was thus properly admissible.

Buckingham v. Ewing, 15 Ill.App.3d 839, 305 N.E.2d 278 (1st Dist. 1973) A non-expert witness may give an opinion authenticating handwriting if he has sufficient familiarity with the handwriting of the alleged writer, such as that gained from having seen the person write or from having been acquainted with his handwriting in the course of business dealings.

People v. Harter, 4 Ill.App.3d 772, 282 N.E.2d 10 (2d Dist. 1972) The trier of fact may determine the genuineness of disputed handwriting specimens by comparison and without benefit of expert opinion. However, the comparison must in the first instance be made in open court in the presence of defendant. It has been held to be error for such samples of handwriting to be taken to the jury room.

Yelm v. Masters, 81 Ill.App.2d 186, 225 N.E.2d 152 (3d Dist. 1967) A non-expert witness may not voice an opinion based upon a comparison of writings, such as a comparison between specimen handwriting and a disputed handwriting.

§19-27(g)
Blood; Hair; DNA

Illinois Supreme Court
People v. Miller, 173 Ill.2d 167, 670 N.E.2d 721 (1996) The trial court did not abuse its discretion by admitting DNA evidence. The process used here to perform the physical analysis (the six-step "Restriction Fragment Length Polymorphism" or RFLP) technique has clearly achieved acceptance in the scientific community. In addition, this method of DNA analysis has been widely approved by courts in various jurisdictions.

While there has been controversy over use of the "product rule" to calculate the frequency of a DNA match, that controversy "seems to be dissipating" as the scientific and legal status for the rule continues to evolve. The Court found that the "most recent courts to consider the use of the product rule have concluded that it is a generally accepted statistical method for estimating the frequency of a DNA match." Thus, "given the testimony the trial court had before it and the current level of acceptance of the RFLP process and the statistical analysis, the trial court did not abuse its discretion" by admitting the DNA evidence. See also, **People v. Pope**, 284 Ill.App.3d 695, 672 N.E.2d 1321 (4th Dist. 1996) (the Polymerase Change Reaction (PCR) method of DNA analysis has achieved scientific acceptance).

People v. Thomas, 137 Ill.2d 500, 561 N.E.2d 57 (1990) The Court upheld the use of the process of "electrophoresis," stating that it is generally accepted by forensic scientists as a reliable method of detecting genetic markers in blood.

Illinois Appellate Court
People v. Dixon, 2022 IL App (1st) 200162 Defendant was convicted of murder based, in part, on the testimony of a blood spatter expert. In a post-conviction petition, defendant alleged ineffective assistance of appellate counsel for failing to challenge the foundation for this expert's testimony, because the expert did not conduct any measurements or calculations in forming his opinion as to the angle at which the blood made contact with defendant's pants and shoes.

According to Illinois Rule of Evidence 705, an "expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."

Here, the expert explained how blood stains are analyzed by detailing the types of observations he made as to the size, shape, location, distribution, numbers, and patterns of blood stains. He explained how and why certain shapes and patterns can indicate distance and force of injury. Any alleged deficiencies in foundation, such as a lack of measurements or calculations, were subjects for cross-examination, and went to the weight of the testimony rather than admissibility. Defense counsel thoroughly questioned the expert about the lack of measurements and calculations, and the expert stated his opinions as to the direction and angle of the spatter did not require calculations. At that point, the issue was one for the jury. In so finding, the appellate court declined to follow the "flawed analysis" of **People v. Safford**, 392 Ill. App. 3d 212 (2009).

People v. Grant, 2020 IL App (3d) 160758 In a prior appeal, defendant successfully argued for DNA on a hair recovered from the complaining witness in defendant's sexual assault case. On remand, it was discovered that the forensic evidence in defendant's case had been destroyed in 2007 pursuant to a Peoria Police Department policy. Defendant sought a new trial or judgment notwithstanding the verdict, arguing that the State had failed in its duty to preserve evidence, and the circuit court denied that motion, finding that the police had not acted in bad faith.

The Appellate Court reversed. Under 725 ILCS 5/116-4, the State is required to retain forensic evidence in sexual assault cases until the defendant has completed his sentence, including mandatory supervised release. The court concluded that this statute is mandatory, not merely directory, noting that rules that require government officials to act in a certain manner and are intended for the protection of public citizens are traditionally mandatory. Section 116-4 protects individuals by ensuring that forensic evidence will be available for potential future testing, with the goal of reducing the number of wrongfully convicted persons in prison. The court found it unlikely that the legislature would provide a right to forensic testing, require that evidence be preserved in order to allow individuals to exercise that right, but not intend an individual have any recourse if the evidence is not preserved.

While 720 ILCS 5/33-5 provides a criminal consequence (Class 4 felony) for failure to comply with the preservation requirements of Section 116-4, the appellate court found that to be a non-existent remedy for an individual who is denied access to testing. Here, the court found that the only remedy available was to reverse defendant's conviction and remand for a new trial. The court noted that on retrial, defendant should be entitled to an instruction allowing jurors to draw a negative inference from the State's failure to preserve the evidence in question, in accordance with **Arizona v. Youngblood**, 488 U.S. 51 (1988).

The dissenting justice agreed that Section 116-4 is mandatory, but would have concluded that the remedy is limited to pursuit of criminal charges under Section 33-5. The dissent also disagreed with the majority's conclusion that the **Youngblood** instruction should be given, noting that there had been no showing of bad faith on the part of the State.

People v. Deroo, 2020 IL App (3d) 170163 Section 11-501.4 of the Vehicle Code specifically allows hospital blood test results to be admitted at defendant's DUI trial as long as the blood was drawn in the normal course of medical treatment. The statute specifies that such results are admitted as part of the business record exception to the hearsay rule. Illinois Rule of Evidence 803(6), however, generally prohibits the use of the business records exception to admit "medical records in criminal cases," as does Section 115-5(c) of the Code of Criminal Procedure.

The Appellate Court, following **People v. Hutchison**, 2013 IL App (1st) 102332, held that section 501.4 evincese the legislature's intent to make an exception to the general rule in DUI cases. That section therefore controls, and the trial court properly admitted the defendant's hospital blood test results at his DUI trial.

People v. Cruz, 2019 IL App (1st) 170886 In a DUI case, the trial court agreed to the State's request to take judicial notice of and instruct the jury pursuant to section 1286.40 of Title 20 of the Administrative Code, which states that the concentration of alcohol in a person's blood serum should be divided by 1.18 to calculate BAC. A doctor testified that defendant's blood test revealed a blood serum alcohol concentration of 190 milligrams per deciliter. In closing, the State completed the calculation and informed the jury that defendant's BAC was 0.16, twice the legal limit.

The Appellate Court rejected the defendant's argument that the State's closing introduced facts outside of the record and that an expert witness was required to provide evidence of defendant's BAC. The court properly took judicial notice of the formula found in the Administrative Code, and using that information, the State properly extrapolated defendant's BAC. An expert is unnecessary where the jury could easily determine BAC for themselves by simply dividing two numbers.

People v. Ernsting, 2018 IL App (5th) 160330 In a State appeal, the Appellate Court affirmed the trial court's decision to suppress the results of a breathalyzer test. After her involvement in a single-car accident, the police arrested defendant for DUI and administered a breathalyzer test which showed a .214 BAC. Before trial, defendant moved to suppress the results as unreliable. Defendant testified that she cut her mouth when the airbag deployed, and that she had blood in her mouth when she took the test. The defense presented unrebutted expert testimony that the blood in her mouth was a contaminant that affected the reliability of her test results. The trial court credited these claims and suppressed the evidence. Where the State offered no expert in rebuttal, the Appellate Court saw no reason to find the trial court's decision at odds with the manifest weight of the evidence and affirmed.

People v. Hamerlinck, 2018 IL App (1st) 152759 Defendant was convicted of two counts of aggravated DUI, each alleging a different minimum blood alcohol content (BAC). The Appellate Court vacated the count alleging the lower BAC (.08) and upheld the greater (.16) on one-act, one-crime grounds.

The Appellate Court rejected defendant's challenge to the admission of his hospital records as proof of his BAC on the basis that the State had not established a chain of custody for his blood. In the trial court, defense counsel stipulated that the hospital records established defendant's BAC was .259 and stated he had no objection to admission of the hospital records as business records. Trial counsel instead defended on the theory that defendant had not been driving the vehicle. Given counsel's repeated concessions to defendant's BAC in the trial court, even if there was error in admission of the hospital records, it was invited error that could not be challenged on appeal.

People v. Turner, 2018 IL App (1st) 170204 The provision in Illinois Rule of Evidence 803(6), exempting medical records from the business records exception in criminal cases, does not supercede section 11-501.4 of the Code of Criminal Procedure, under which blood or urine test results are admissible as business records in DUI cases. The committee comments to the Illinois Rules of Evidence express an intent not to supercede existing statutes. The Illinois Supreme Court's decision in **People v. Peterson**, 2017 IL 120331, which found a rule of evidence supercedes a legislative enactment when an irreconcilable conflict exists, does not apply, because the commentary avoids such a conflict.

People v. Pike, 2016 IL App (1st) 122626 Evidence is admissible only if it is relevant to an issue in dispute. Relevant evidence is defined as evidence that makes the existence of any consequential fact more probable or less probable than it would be without the evidence. Ill. R. Evid. 401.

The State's expert compared a DNA profile found on a firearm connected to the offense with defendant's DNA profile and concluded that he could not be excluded as a contributor. But the expert's statistical analysis showed that approximately 50% of unrelated individuals also could not be excluded as contributors to the DNA profile found on the firearm. In other

words, one out of every two randomly selected individuals could not be excluded. Defendant did not object to this testimony.

The Appellate Court held that the expert's testimony was irrelevant and should not have been admitted. Since the statistical evidence showed that 50% of the population could not be excluded as potential contributors, that probability did not make defendant's identification any more or less probable. It was thus irrelevant.

But the court further held that the admission of this testimony was not plain error. The evidence was not closely balanced and the error was not serious error and thus neither prong of the plain error doctrine was satisfied. Defendant's conviction was affirmed.

The dissent believed the evidence was closely balanced and thus would have reversed defendant's conviction.

People v. Nelson, 2013 IL App (1st) 102619 At defendant's jury trial for aggravated kidnaping and aggravated criminal sexual assault, the State presented evidence that Cellmark, a private laboratory, extracted a DNA profile from a rape kit taken from the victim at the hospital. The DNA profile developed by Cellmark was subsequently matched by a different expert to the defendant's profile, which was contained in a database in Illinois.

The only evidence concerning the Cellmark report was the testimony of a Cellmark supervisor, who took cuttings from the rape kit, reviewed the data and documentation, and authored the report in this case. The witness testified that several people worked on various stages of extracting the DNA from the rape kit, and that much of the work was done by robotic instrumentation. The witness also testified that the controls utilized by Cellmark were in proper order and working correctly in this case.

The Appellate Court concluded that defendant's Sixth Amendment right to confrontation was not violated by admission of the supervisor's testimony concerning the Cellmark report. First, the court found that the evidence not testimonial under Justice Thomas's rationale in **Williams**, which required forensic reports to be formalized and sufficiently solemn. Furthermore, the evidence was not "testimonial" under the plurality's definition in **Williams** because it did not accuse a particular person of a crime.

Alternatively, the court concluded that a supervisor who participated in the DNA extraction process may testify concerning the process by which the DNA profile was developed. The court concluded that the case involves an issue which has been left open by the U.S. Supreme Court - where DNA evidence is developed by a team, how many members of the team must testify in order to satisfy the defendant's confrontation rights. Without explaining its holding, the court concluded that the testimony of a supervisor who actually participated in the DNA testing is sufficient to satisfy the defendant's confrontation rights and that the State was not required to call other members of the team.

Defendant's convictions for aggravated kidnaping and aggravated criminal sexual assault were affirmed.

People v. Wright, 2012 IL App (1st) 073106 Rule 705 of the Illinois Rules of Evidence, which codified existing law, permits an expert to give an opinion without divulging the basis for it. Rule 705 shifts the burden to the opposing party to elicit and explore the underlying facts or data on cross-examination. An unnecessary curtailment of cross-examination undercuts the burden-shifting scheme embodied in Rule 705.

Rule 703 provides that even if facts or data are not admissible in evidence, the expert may be asked to offer an opinion based on them, if they are disclosed at or before trial and if they are of a type reasonably relied on by experts in the particular field in forming opinions or inferences upon the subject.

The State's witness was qualified as an expert in the field of forensic DNA analysis and testified that there was a nine-loci match between defendant's DNA profile and a male DNA profile derived from the complainant's rectal swab, and that he had not seen a nine-loci match result in an exclusion upon comparison of further loci. This evidence was the primary evidence of defendant's guilt. The court then blocked the defense from asking any questions about a forensic DNA study from Arizona that the defense had provided the witness prior to trial that found 120 nine-loci matches in that state's database of over 65,000 offenders.

Cross-examination regarding the Arizona study was relevant to the jury's determination of the weight to be given to the expert's testimony regarding the statistical probability of the nine-loci match by showing that such matches were not uncommon. Even if the Arizona study was not independently admissible at trial, the expert could have been cross-examined about it. The defense was denied the opportunity to ask the expert whether the study was the type of data usually relied on by experts in his field. As this ruling limited the ability of the defense to expose potential errors or discrepancies in the crucial DNA test results, it was an abuse of the court's discretion and not harmless.

People v. Wheeler, 334 Ill.App.3d 273, 777 N.E.2d 961 (3d Dist. 2002) At least in the absence of visible evidence of blood, the Leuco-Malachite Green (LMG) test, which purports to disclose the possible presence of blood by use of a chemical to enhance blood that is invisible to the naked eye, is not generally accepted in the scientific community as raising a presumption that blood is present.

People v. Owens, 155 Ill.App.3d 990, 508 N.E.2d 1088 (4th Dist. 1987) A police officer was improperly allowed to testify about "blood-spatter analysis" to show the position of the decedent when he was shot. The reliability of "blood-spatter analysis" has not been recognized in Illinois, and the State did not demonstrate its reliability or establish the officer's qualifications as an expert.

People v. Schulz, 154 Ill.App.3d 358, 506 N.E.2d 1343 (1st Dist. 1987) At the defendant's trial for murder and deviate sexual assault, the State, over objection, was allowed to introduce expert testimony concerning the results of blood and enzyme testing. The conclusions of the experts were that the samples came from 20% of the population, which included defendant, and that defendant therefore could not be excluded as the source.

The Appellate Court held that the above evidence should have been excluded because it was not relevant. By merely placing defendant in an extremely large category of possible donors, the evidence did not tend to make the likelihood that defendant committed the crimes more or less probable.

People v. Columbo, 118 Ill.App.3d 882, 455 N.E.2d 733 (1st Dist. 1983) An expert may properly testify that the defendant's hair is similar in color and characteristics to hair found at the crime scene. The fact that the expert could not positively say that both hairs came from the same source, but only that it was possible, did not render the testimony inadmissible. An expert's lack of certainty goes to the weight of the testimony and not to its admissibility. Compare, **People v. Giangrande**, 101 Ill.App.3d 397, 428 N.E.2d 503 (1st Dist. 1981) (prosecutor improperly stated that defendant's hair was found at the crime scene, since the expert testimony was only that the hair could have originated from defendant).

People v. Gillespie, 24 Ill.App.3d 567, 321 N.E.2d 398 (2d Dist. 1974) The Court recognized the scientific reliability of the ABO system of blood groupings. Thus, an expert was properly

allowed to testify that the blood found at the crime scene was the same type as defendant's and concerning the percentages of the population with various blood types.

§19-28
Writings

§19-28(a)
Best Evidence Rule

Illinois Supreme Court

People v. Smith, 2022 IL 127946 Defendant was convicted of burglary of an apartment. Prior to trial, defendant sought to bar admission of two short video clips of surveillance footage showing the hallway outside of the apartment. In one clip, defendant was seen standing outside of the apartment door for a moment. In the other, approximately 20 minutes later, defendant was seen exiting the apartment. No video showed defendant entering the apartment, but there was evidence that an outside window to the apartment appeared to have been tampered with. The two video clips had been recorded by pointing an iPhone video camera at a video monitor as the surveillance footage played because the apartment manager was unable to otherwise export the video footage before its automatic deletion. Defendant's motion was denied, and the video clips were admitted and played for the jury.

On appeal, defendant argued that the trial court erred by admitting the video clips under either Rule 1003 or 1004 of the Illinois Rules of Evidence. Alternatively, he argued that the video clips should have been barred under the best evidence rule.

Rule 1003 allows for the admission of a "duplicate" video to the same extent as the original unless there is a genuine question of authenticity of the original or it would be unfair under the circumstances to admit the duplicate in lieu of the original. Under Rule 1001(4), a duplicate can be produced "by means of photography" or "electronic re-recording" or equivalent methods "which accurately reproduces the original." And, Rule 1004 allows a party to use other evidence to prove the contents of lost or destroyed recordings, so long as the original was not lost or destroyed in bad faith.

Defendant argued that the cell phone video clips were not duplicates, specifically that they did not accurately reproduce the original because they captured only two small portions of the original footage. The Court disagreed. Rule 1001(4) does not require that a duplicate reproduce the original in its entirety. And, the admission of only portions of the original was not unfair under Rule 1003. Defense counsel was able to cross-examine the apartment manager about the decision to record only portions of the original surveillance, and was able to argue the potential significance of the missing portions to the jury. Thus, the jury was able to determine what weight to give the video clips, and their admission was not unfair.

Because the video clips were properly admitted under Rule 1003, it was unnecessary to consider the application of Rule 1004. The Court also held that the common law best evidence rule was abrogated by the codification of the Illinois Rules of Evidence. Thus, the best evidence rule could not serve as an independent basis to challenge admission of the video clips.

People v. Baptist, 76 Ill.2d 19, 389 N.E.2d 1200 (1979) A State witness was properly allowed to testify about the contents of a letter she allegedly received from the defendant, though the letter itself was not introduced. A sufficient foundation was laid to permit parole evidence of the contents where the witness was the recipient and custodian of the letter, stated when she

received it, described its return address and signature (the defendant's), and explained the reason for the letter's unavailability (destroyed by fire).

People v. Pelegri, 39 Ill.2d 568, 237 N.E.2d 453 (1968) Where witness admits making a prior inconsistent statement, the best evidence rule does not require that the statement itself be introduced.

People v. Taylor, 40 Ill.2d 569, 241 N.E.2d 409 (1968) The State was properly allowed to introduce a copy of defendant's confession where neither the State nor defense could produce the original after a diligent search; in view of the unavailability of the original, the court reporter's copy was the best evidence of the statement.

People v. Brengettsy, 25 Ill.2d 228, 184 N.E.2d 849 (1962) Police officer properly testified about capsules found during search — the testimony was not subject to objection that the best evidence was the capsules themselves. See also, People v. Ristau, 363 Ill. 583, 2 N.E.2d 833 (1936) (description of clothing).

People v. Ristau, 363 Ill. 583, 2 N.E.2d 833 (1936) The best evidence rule applies only to proof of the contents of documents, and requires that the original document be produced or an explanation made for its unavailability before secondary evidence may be introduced.

Illinois Appellate Court

People v. Smith, 2021 IL App (5th) 190066 A majority of the court, relying on different theories, upheld the admission of two iPhone videos linking defendant to a burglary. The building's owner had been unable to export surveillance camera footage before its automatic deletion, so he used his phone to record the screen. He then provided two clips to the police. Defendant alleged that the screenshot videos violated the best evidence rule because they were duplicates of the original surveillance footage.

The lead opinion found the videos admissible. Under Illinois Rule of Evidence 1003, "[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." While defendant contended that a partial recording of the original was not a "duplicate," the lead opinion found the recordings admissible under Rule 1004(1), which allows a party to use other evidence to prove the contents of lost or destroyed recordings. There was no evidence of bad faith in the loss of the original evidence, and federal caselaw established that gaps alone do not create unfairness to the objecting party.

A concurring justice agreed with the State's argument that the videos were admissible under the silent witness theory as outlined by **People v. Taylor**, 2011 IL 110067. It also would find them admissible as duplicates under Rule 1003.

A dissenting justice would have held the videos inadmissible for lack of foundation under **Taylor**. The building's owner admitted that the surveillance system was new, did not testify as to its reliability, and was unable to competently operate the equipment, as shown by his failure to export or preserve the recordings. The testimony as to how the recordings were recorded on an iPhone and delivered to the police was "murky," and it was unclear why only two clips were chosen out of the full original footage. The dissent would further hold that the clips were inadmissible as "duplicates" because the use of two 20-second clips from the full original footage was unfair to defendant under Rule 1003.

People v. Deroo, 2020 IL App (3d) 170163 Section 11-501.4 of the Vehicle Code specifically allows hospital blood test results to be admitted at defendant's DUI trial as long as the blood was drawn in the normal course of medical treatment. The statute specifies that such results are admitted as part of the business record exception to the hearsay rule. Illinois Rule of Evidence 803(6), however, generally prohibits the use of the business records exception to admit "medical records in criminal cases," as does Section 115-5(c) of the Code of Criminal Procedure.

The Appellate Court, following **People v. Hutchison**, 2013 IL App (1st) 102332, held that section 501.4 evincese the legislature's intent to make an exception to the general rule in DUI cases. That section therefore controls, and the trial court properly admitted the defendant's hospital blood test results at his DUI trial.

People v. Davis, 2014 IL App (4th) 121040 Defendant argued that his trial counsel was ineffective for failing to object to the introduction of a text message used to prove his intent to deliver cocaine. The State introduced evidence that a detective searched defendant's cell phone and found a text message asking to meet defendant "for a 30 or a 40." During defendant's interrogation (recorded on video and played at trial), the detective confronted defendant with this message. The detective then testified that he believed this message was about trying to purchase $30 or $40 of cocaine.

Defendant argued that counsel should have objected to the text message on three grounds: (1) lack of foundation; (2) violation of the best evidence rule; and (3) hearsay. The Appellate Court held that counsel was not ineffective since none of these objections would have succeeded.

The court rejected the foundation argument because it rested on a faulty assumption that the State had to lay a foundation for the introduction of a document. The State, however, never introduced any document. It simply played a video of the interrogation where the detective confronted defendant with the text message and then asked the detective what the message meant. Once the detective testified that he had read the message, there was a proper foundation for him to testify about its contents.

The court rejected the best evidence rule argument because it only applies when the contents of a writing are at issue. Here the State did not try to prove the content of the text message; it instead used the text message as circumstantial evidence that defendant intended to deliver cocaine. The actual content of the message did not matter.

Finally, the court rejected the hearsay argument because the detective's testimony about the contents of the text message was not offered to prove the truth of the matter asserted in the message. Instead, it was offered to show police investigation and circumstantial evidence of defendant's intent.

People v. Diomedes, 2014 IL App (2d) 121080 In order to admit a document as substantive evidence, the proponent must authenticate its authorship. A document may be authenticated through circumstantial evidence. In other words, the authentication requirement is satisfied where the document's contents, in conjunction with other circumstances, reflect distinctive characteristics which connect it to the author. Illinois Rule of Evidence 901(b)(4).

At defendant's trial for disorderly conduct based on transmitting by email a threat of violence, the email in question was properly authenticated by circumstantial evidence. Thus, the email was properly admitted substantively.

The court noted that the email raised several matters that were also contained in notes on a folder which was confiscated from defendant. Under the circumstances, it would have been reasonable for the trial court to find that the same person wrote both the email

and the notes on the folder. The court also noted that in a voluntary written statement, defendant stated that he had written the email.

Under these circumstances, the email was sufficiently authenticated to be admitted. The court rejected defendant's argument that to authenticate an email, the State was required to present evidence to "connect" defendant to the IP address from which the email was sent.

People v. Lopez, 107 Ill.App.3d 792, 438 N.E.2d 504 (1st Dist. 1982) Trial court did not err in allowing the State to introduce photocopies of two evidence envelopes and three pages from the crime laboratory log book. The copies showed the initials of certain officers, the date and the case number. Both an officer and a chemist identified the copies as true and accurate. The originals had been lost, but not in bad faith.

People v. Ripa, 80 Ill.App.3d 674, 399 N.E.2d 1000 (2d Dist. 1980) Police officer properly testified about various items which had defendant's name on them. The inscriptions or labels were not within the best evidence rule - the sole question was whether the defendant's name was in fact affixed rather than the content of the writing.

People v. Klisnick, 73 Ill.App.3d 148, 390 N.E.2d 1330 (1st Dist. 1979) The best evidence rule applies only when proof of the contents of a document (as distinguished from its existence) is at issue. The original of a document is not required if it is lost and was not lost by the proponent in bad faith. Furthermore, parole proof may be admitted only after secondary evidence, such as duplicates or copies, are accounted for.

People v. Munoz, 70 Ill.App.3d 76, 388 N.E.2d 133 (1st Dist. 1979) The Court discussed the authentication of documents and held that a letter allegedly written by defendant was properly admitted into evidence. The letter appeared to emanate from defendant's cell, bore his signature and nickname, and included information known to him.

§19-28(b)
Business and Public Records

The admission of business records is subject to 725 ILCS 5/115-5 ("Business Records as Evidence") (formerly Ch. 38, §115-5(c)(2)).

Illinois Supreme Court
People v. Deroo, 2022 IL 126120 Defendant challenged the introduction of chemical blood test results at his DUI trial. The results were admitted into evidence pursuant to section 11-501.4(a) of the Illinois Vehicle Code, which allows the admission of chemical blood tests conducted in the course of emergency medical treatment "as a business record exception to the hearsay rule."

On appeal, defendant argued that section 11-501.4(a) conflicts with Illinois Rule of Evidence 803(6), which expressly excludes "medical records in criminal cases" from the business records exception to the hearsay rule. Defendant contended Rule 803(6) should control over section 11-501.4(a) and, therefore, that the results of the chemical blood tests should have been deemed inadmissible hearsay.

After reviewing the history and purpose of the rule's exception, the supreme court decided to amend Rule 803(6) by removing the exception. The court cited its prerogative to

depart from the rule-making procedures set forth in Illinois Supreme Court Rule 3 and utilize a case before it as a vehicle to adopt a rule change.

The exception for medical records in Rule 803(6) stemmed from a line of authority that required expert testimony in order to introduce medical diagnoses and opinions. This authority had been codified in section 115-5(c)(1) of the Code of Criminal Procedure in 1963, which excluded medical records from the definition of business records. But its rationale was called into question in 1975, when Federal Rule of Evidence 803(6) included medical opinions and records in its definition of business records, finding them particularly trustworthy. When Illinois adopted rules of evidence in 2010, it adhered to the exception for medical records found in section 115-5(c)(1), though it followed the federal lead on medical opinions, allowing them as business records. Given that section 115-5(c)(1) was based on a line of authority involving medical opinions that is no long followed, the Supreme Court found it could not justify continued adherence to an exception for medical records.

Thus, Rule 803(6) no longer contains an exception for medical records in criminal cases. Medical records, including the results of chemical blood tests, may be considered business records. The amendment applies to the instant case, and all pending and prospective cases.

People v. Brand, 2021 IL 125945 At trial on charges of home invasion, aggravated domestic battery, and possession of a stolen motor vehicle stemming from an incident at his ex-girlfriend's apartment, defendant's ex-girlfriend (Shannon) testified regarding two messages she received on Facebook Messenger, one a few days after the incident and another a couple of weeks later. The messages came from an alias, Masetti Meech, which defendant had previously used to communicate with Shannon via Messenger. Shannon testified that she deleted the first message, which told her where she could locate her car. She produced a photograph of the second message, which stated that this was "just the beginning" and listed several numbers which Shannon said referred to addresses where she and her relatives lived and worked. That second message also stated that her son would not "see 16."

Defendant noted that social media presents unique authentication problems because of the potential for hacking or otherwise gaining unauthorized access to an account and the ease with which fraudulent accounts can be created and argued for a higher standard for the foundational requirements for digital messages. The State, on the other hand, argued that digital messages should be subject to the same authentication standards as any other documentary evidence.

Ultimately, the Court agreed with the State. Authentication is established by evidence sufficient to support a finding that the matter in question is what its proponent claims. Under Illinois Rule of Evidence 901(b)(4), authentication may include evidence of distinctive characteristics such as appearance, contents, substance, or internal patterns, "including those that apply to the source of an electronic communication." While the specific reference to electronic communication was added after defendant's trial, the Court held that it merely clarified what was already implicit.

Here, the messages were properly authenticated by Shannon's testimony that defendant had used the same alias to communicate with her via Messenger while they were dating, the first message contained accurate information about the location of her vehicle which Shannon said defendant had taken on the night of the incident, and the second message contained unique information known only to a small group of people (specifically, the streets on which Shannon and her relatives lived and worked, as well as the age of her son). Thus, the distinctive content of the messages provided an adequate foundation for their admission under the circumstances presented here.

People v. Hagan, 145 Ill.2d 287, 583 N.E.2d 494 (1991) While defendant was negotiating with a man named Flynn to obtain a certain lease agreement, he went to a mailing business and "faxed" a financial statement to Flynn. The Supreme Court held that the foundational requirements for introducing the "faxed" document were satisfied.

An employee of the mailing business testified that defendant came to the business on the day in question and had a document faxed. This employee also explained the procedures involved, including the fact that the business name, date, and time appeared on the "faxed" document. In addition, Flynn testified that he received the document on the afternoon it was sent.

People v. Smith, 141 Ill.2d 40, 565 N.E.2d 900 (1990) Writings, records and reports of police officers relating to police investigations are generally excluded from the business records exception to the hearsay rule. Such documents generally lack the earmarks of trustworthiness and reliability which are the true basis for the business records exception to the rule against hearsay and which business records are presumed to have.

Prison incident reports also lack the necessary earmarks of trustworthiness and reliability, and are not admissible under the business record exception. See also, **In re N.W.**, 293 Ill.App.3d 794, 688 N.E.2d 855 (1st Dist. 1997) (error to admit "unusual incident reports" prepared by juvenile facility in anticipation of disciplinary proceedings).

People v. Holowko, 109 Ill.2d 187, 486 N.E.2d 877 (1985) Chapter 38, §115-5(c)(2), which provides that records made in the regular course of business are inadmissible if made "during an investigation of an alleged offense or during any investigation relating to pending or anticipated litigation of any kind," is inapplicable to a phone "trap" or "tracer" (i.e., an electronic device whereby a computer automatically records the telephone numbers of all calls coming into the "trapped" telephone.) "[T]he printout of results of computerized telephone tracing equipment is not hearsay evidence of the type contemplated by section 115-5(c)(2)." Such a printout merely "represents a self-generated record of [the device's] operations, much like a seismograph can produce a record of geophysical occurrences" or a flight recorder creates a record of physical conditions on board aircraft. Such records are admissible with a foundation consisting of proof of the method in which the information was recorded and that the device was properly functioning.

People v. Cheek, 93 Ill.2d 82, 442 N.E.2d 877 (1982) Trial court properly excluded an FBI "rap sheet" from evidence. Because no witness could actually say how the "rap sheet" was received, it was not properly authenticated.

People v. Jackson, 41 Ill.2d 102, 242 N.E.2d 160 (1968) A jail inmate card, kept as a statutory requirement and containing such information as a description of the person, was properly admitted into evidence.

Illinois Appellate Court

People v. Taber, 2023 IL App (2d) 220288 Messages sent from defendant to two probation officers via a kiosk system available to inmates in the county jail were properly admitted into evidence over defendant's foundational objection. Authentication of documentary evidence requires that the proponent present evidence that it is what the proponent claims it to be under Illinois Rule of Evidence 901(a). Here, defendant had admitted that he was the author of the kiosk messages. Additionally, jail personnel testified about the kiosk system, including

that inmates must sign in with their ID number to send messages and that the messages were automatically time-and-date stamped. This was sufficient to authenticate the messages, and thus their admission was not error.

People v. Garcia, 2023 IL App (1st) 220524 During defendant's trial on a charge of felony driving while license revoked, the State introduced a "court purposes" driving abstract to establish that defendant's license was revoked at the time and that he had the requisite prior convictions. Defendant did not object to admission of the abstract at trial or in his post-trial motion. On appeal, though, defendant argued that admission of the abstract deprived him of the right to confrontation.

The appellate court affirmed. There was no error, and thus no plain error. A driving abstract is not testimonial and therefore the confrontation clause does not apply. A driving abstract contains historical information about defendant's driving record. Attaching the label "court purposes" to the abstract does not mean that it was prepared in anticipation of trial and does not render it testimonial. Further, a driving abstract from the Secretary of State is a public record and therefore fits within an exception to the hearsay rule under Illinois Rule of Evidence 803(8).

People v. Fox, 2022 IL App (4th) 210262 The trial court erred when it admitted cell phone records as self-authenticating business records pursuant to Illinois Rules of Evidence 806(b) and 902(11). Rule 902(11)'s self-authentication standard requires a custodian to attest the evidence qualifies as business records via certification, defined as "a written declaration under oath subject to the penalty of perjury."

Here, the certification did not state that it was written under oath. Although the State asked the appellate court to infer that it was written under oath because it stated that it was written "under penalty of perjury," the appellate court refused to make such an inference give the plain language of the rule.

The error was harmless, however. The cell phone evidence merely corroborated the testimony of defendant's girlfriend, whose credible testimony about defendant's actions after the shooting was also corroborated by other uncontested evidence. Additionally, the defense mitigated the impact of the cell phone evidence by establishing through cross-examination that tracking phones to cell towers can only provide an approximation of the phone's location and it can't determine who is actually carrying the phone.

People v. Schwandt, 2022 IL App (4th) 200583 The trial court did not commit plain error when it admitted a Secretary of State certified driving abstract in order to prove defendant drove with a suspended license. The abstract did not violate the confrontation clause because it was not created in anticipation of litigation and was therefore not testimonial. Rather, the information was collected prior to defendant's traffic stop. While the abstract was labeled "COURT PURPOSES," this label indicated why the abstract was copied, not that the information was documented for purposes of defendant's trial. Furthermore, the abstract was admissible under the public records exception to the hearsay rule codified in Illinois Rule of Evidence 803(8), because the certified driving abstract contained information the Secretary of State was, by law, required to report.

People v. Hauck, 2022 IL App (2d) 191111 The admission of evidence is generally reviewed for an abuse of discretion. Here, however, where the issue involved the interpretation of Illinois Rule of Evidence 902(11), it presented a question of law reviewed *de novo*.

Rule 902(11) provides that extrinsic evidence of a record's authenticity is not required where the record is accompanied by a written certification that it was made at or near the time of the occurrence, was kept in the course of regularly conducted activity, and was made as a regular practice. The rule further provides that "certification" means a written declaration under oath subject to the penalty of perjury.

Defendant challenged the cell phone record-keeper's certification on the basis that it did not satisfy the "under oath subject to the penalty of perjury" requirement of the Illinois rule. The certification did not state that it was made under oath and did not contain any evidence from which it could be inferred that it was made under oath, such as a notarization. The State argued that the certification was adequate because it stated that the record-keeper was "duly sworn."

The purpose of Rule 902(11) is to provide an alternate means of establishing an adequate foundation for business records without the need for a representative of the business to testify in court. The duty for laying the required foundation still lies with the proponent of the document. The certification here failed to satisfy the plain language of Rule 902(11) and thus it was inadequate.

And, while the testimony of another witness who was a party to the text messages at issue was sufficient to authenticate that the text conversation occurred, that evidence did not render the text messages admissible at trial given that they were hearsay. Rule 803(6) creates a hearsay exception for business records, and Rule 902(11) provides a method for establishing that certain records are business records. Authentication of the text messages by a party to them, however, did not, and could not, establish that they were business records. Thus, they were hearsay and inadmissible.

Ultimately, though, the court concluded that the error in admitting the text messages was harmless. The case boiled down to a credibility contest, and the Appellate Court deferred to the trial court's credibility determinations, as well as the fact that the cell phone records were cumulative of other properly admitted evidence.

People v. Brown, 2021 IL App (3d) 170621 The trial court abused its discretion by admitting phone records at defendant's murder trial. The phone records were computer generated by the cell phone carrier. As such, they had to meet the foundational requirements for both business records and computer-generated records. After the defense's foundation objection, the State offered no evidence that the records met the requirements for computer-generated records: (1) that standard equipment was used; (2) that the particular computer generates accurate records when used appropriately; (3) that the computer was used appropriately; and (4) that the sources of the information, the method of recording, and the time of preparation indicate that the record is trustworthy. The trial court erred when it admitted the records based solely on the business record exception without analyzing the computer-generated record requirements.

The admission of the records were not harmless. An eyewitness identified defendant as the shooter, and defendant's DNA was found at the scene. But defendant and a second eyewitness testified that defendant was not the shooter. The phone records showed several communications between the defendant and this second eyewitness around the time of the offense. The improperly admitted evidence therefore undermined their credibility and prejudiced defendant's case.

People v. Curry, 2020 IL App (2d) 180148 Facebook account information, including name, address, telephone number, and email address were properly admitted as self-authenticating business records under Illinois Rules of Evidence 803(6) and 902(11) where the State

submitted a written certification from an individual at Facebook attesting to the foundational requirements for admission.

And, Facebook messages between defendant and the complainant were properly admitted where there was substantial evidence substantiating the messages and connecting them to defendant. Here, that evidence included that the messages contained information only defendant would have known, they used defendant's nickname for the complainant, and they demonstrated a familiarity with the incident in question. Further, the messages stopped when the complainant told the police she was receiving them, prompting the police to take defendant's phone from him. Thus, the messages were sufficiently authenticated to render them admissible.

People v. Brand, 2020 IL App (1st) 171728 Defendant did not forfeit his argument that incriminating Facebook messages were insufficiently authenticated for admission at trial. The defense objected to the evidence on relevance and foundation grounds, and included the issue in a post-trial motion. This sufficiently alerted the trial court to the potential problem of insufficient authentication.

Substantively, however, the evidence was admissible. Social media content should be treated as documentary evidence and therefore must be authenticated for admission at trial. Authentication occurs when the State establishes the source of the message or post, which can be accomplished in a variety of ways. Here, the complainant testified that she received threats from a Facebook account that used a name other than defendant's, but she also testified that she knew the account to be defendant's, because defendant had previously used the account to contact complainant. Moreover, the message contained information only the defendant would have known. This testimony was sufficient to authenticate the messages.

People v. Johnson, 2019 IL App (1st) 161104 The State admitted an Illinois State Police certification stating that defendant did not possess a valid FOID card. Defense counsel acquiesced in the certification's entry into evidence. The Appellate Court rejected defendant's attempt to raise the issue as plain error, finding invited error. Moreover the claim could not be raised as counsel's ineffectiveness because decisions about stipulations are strategic.

People v. Maas, 2019 IL App (2d) 160766 Defendant led police on a high-speed chase before the officers shot him in the face and he crashed into oncoming traffic, injuring other drivers. He fled the car and hid, but was eventually arrested and transported to the hospital for treatment. The jury found him guilty of, *inter alia*, failure to report a car accident involving personal injury under 625 ILCS 5/11-401(b).

The Appellate Court affirmed, rejecting defendant's argument that his injury and hospitalization extended the statute's 30-minute reporting time. The evidence showed that more than 30 minutes passed between the accident and the arrest, and, viewed in the light most favorable to the State, the evidence did not support the defendant's argument that his gunshot wound to the face prevented him from reporting. Defendant's failure to report within those 30 minutes constituted a violation of section 11-401(b).

People v. Ramos, 2018 IL App (1st) 151888 Historical cell site analysis report, showing which towers cell phone pinged and at what times, was hearsay. While such cell phone records are frequently admissible as business records, the State did not call a witness to lay a proper foundation and the report was not certified as self-authenticating in accordance with Illinois Rule of Evidence 902(11). A detective's testimony as to the locations where the co-

defendant's phone traveled during the relevant period was improperly admitted because it was based on the historical cell site analysis report.

The Appellate Court also held that the trial court erred when it prevented defense counsel from using his annotated copy of the trial transcript during his closing argument. The court's blanket prohibition denied counsel access to his notes and could not be justified by the fact that the transcript had not yet been "certified." This error interfered with defendant's sixth amendment right to counsel, and in this closely balanced case, was not harmless beyond a reasonable doubt.

People v. Kent, 2017 IL App (2d) 140917 As a matter of first impression in Illinois, the Appellate Court held that in order to authenticate a Facebook post for admission in a criminal trial, the proponent must produce evidence that is sufficient to allow a reasonable juror to find that the evidence is in fact what it is claimed to be. Evidence of authentication may be direct or circumstantial, but the most common form is the testimony of a witness with knowledge of the nature of the evidence. In addition, some evidence can be authenticated by the combination of all the relevant circumstances and the distinctive characteristics of the item such as appearance, contents, substance, or internal patterns.

Defendant was charged with a murder in which the decedent was killed in his driveway. A police officer testified that on the day after the offense, he used a fake profile to search Facebook. He testified that he found a profile under a name and nickname that were similar to defendant's along with a photograph which resembled defendant and an undated posting which stated that "its my way or the highway . . . leave em dead n his driveway." The officer did not know when the post had been created, but he testified that it was deleted later the same day.

The court concluded that there was no evidence to justify a reasonable conclusion that defendant created the post or was responsible for it. Thus, the foundation was insufficient to justify use of the Facebook post as an admission by defendant. Defendant did not admit to creating the Facebook profile or making the post, and was not observed composing the communication. The State presented no Facebook records to indicate that the IP address used to create the profile or the post was in any way associated with defendant, and failed to even connect defendant to the last name used in the profile.

The court acknowledged that there was some circumstantial evidence of authentication in defendant's nickname, the fact that the decedent was killed in his driveway, and the photograph allegedly resembling defendant, but noted that the record failed to show that such matters were not public knowledge which could have been used to create the profile without defendant's awareness. The court stressed the ease of creating false Facebook pages and the fact that no verification of identify is required to create a Facebook profile. Even the detective's testimony that the post had been "deleted" is questionable, as the person who created the post could have changed the privacy settings in a way that merely denied public access to it.

The court stated, "At best, the photograph and the name on the Facebook profile are *about* defendant and not evidence that defendant himself had created the post or was responsible for its contents. . . . The ease in fabricating a social media account to corroborate a story means that more than a 'simple name and photograph' are required to sufficiently link the communication to the purported author."

Because the trial court improperly admitted the Facebook post, and because the State argued the existence of the post as an admission by defendant that he had committed the murder, reversible error occurred. The conviction was reversed and the cause remanded for a new trial.

People v. Harper, 2017 IL App (4th) 150045 Rule 803(6) is an exception to the hearsay rule that permits the admission of records that were kept in the regular course of business. Ill. R. Evid. 803(6). Business records sometimes contain multiple layers of hearsay if they include information supplied by a declarant who is not himself under a duty to provide such information for the business. Multiple layers of hearsay are admissible only where both the source and the recorder of the information are acting in the regular course of business.

Defendant was charged with first degree murder. Shortly after the offense occurred several text messages were sent to defendant's phone number from an unidentified person. The first message said "I heard you had something to do with a white boy getting killed today." Defendant responded, "What white boy?" Another message followed a few minutes later. It said, "Out in the hood." Defendant replied, "What are you talking about?" The unidentified person then responded with a third and final message: "I heard a white boy got killed in the hood and you and some of your guys did it. That's the word on the street."

The Appellate Court held that none of the incoming text messages were admissible under the business records exception to the hearsay rule. Neither defendant nor the person or individuals sending him text messages were acting in the regular course of business. A record from the phone company showing the time and recipient or maker of texts to or from a number registered to a defendant would be admissible as a business record. But the content of these messages would not be admissible. The State never identified who sent the messages nor the source of the information in the texts. And even if the texters had been identified and called as witnesses at trial, they could not testify that they "heard on the street" that defendant was involved in the offense.

Since the admission of these text messages was "extremely prejudicial," the court reversed defendant's conviction and remanded for a new trial.

People v. Watkins, 2015 IL App (3rd) 120882 A proper foundation is laid for admitting documentary evidence, including text messages, when the document is identified and authenticated. To authenticate a document, the proponent must demonstrate that the document is what it is claimed to be. Documentary evidence may be authenticated by either direct or circumstantial evidence. Circumstantial evidence includes appearance, contents, substance, and distinctive characteristics. Documentary evidence may be authenticated by its contents if it contains information that would only be known by the author or a small group of people including the author.

Here, the State introduced text messages to show that defendant used the cell phone found in a drawer and thus, by implication, also possessed drugs found in the drawer. But the only evidence offered by the State to authenticate the text messages was that the cell phone was found in the same house as defendant, albeit in a drawer in a common area, and that some of the messages referred to, or were directed at, a person with the same first name as defendant. There were no cell phone records or eyewitness testimony showing that the phone belonged to or had been used by defendant, or that any of the messages were sent to defendant. And there were no identifying marks on the cell phone or its display screen indicating that it belonged to defendant.

Under these facts, the evidence did not properly authenticate that the text messages were sent to defendant, and thus the presence of the phone in the drawer did not show by implication that defendant also possessed the drugs. Defendant's conviction was reversed and remanded for a new trial.

People v. Coleman, 2014 IL App (5th) 110274 Under **Frye**, scientific evidence is admissible only if the methodology or scientific principle is sufficiently established to have gained general acceptance in its particular field. But **Frye** only applies to scientific evidence. If an expert's opinion is derived solely from his observations and experiences, it is not scientific evidence.

Following a **Frye** hearing, the State was allowed to introduce the testimony of an expert linguist who compared and found similarities between written material produced by the offender and written material produced by defendant. Defendant argued that it was error to admit this evidence because the field of authorship attribution was new and more research was needed before it could become a reliable scientific tool.

The court held that this testimony was not scientific and thus was not subject to the **Frye** test. The expert did not apply scientific principles in rendering his opinion. He instead relied on his skill and experience-based observations in pointing out similarities between the written material produced by the offender and defendant, and never gave an opinion about who was the actual author of the offender's writings. The testimony was thus properly admissible.

The trial court did not abuse its discretion in allowing an expert in document examination to compare writings spray-painted on the wall of the murder scene with defendant's known writings in documents. Although there is some difficulty in comparing writing in documents with spray-painted writing on a wall, the expert merely pointed out similarities between the writings and never identified defendant as the actual author of the wall writing. The jury, which saw photographs of the wall writing was thus free to accept or reject the expert's testimony. Defense counsel thoroughly cross-examined the expert, and presented his own expert who cast doubt on the ability to make such comparisons.

The admission of testimony about defendant's internet provider (IP) addresses did not violate his right to confrontation. The IP addresses were used to show that defendant sent the email threats that allegedly came from a third party who had a motive to harm the decedent. The IP addresses were obtained from Google's records and were kept in the ordinary course of business. Business records are created for the administration of a company's affairs, not for the purpose of providing evidence at trial. As such, they were not testimonial in nature and thus did not violate the confrontation clause.

People v. Harris, 2014 IL App (2d) 120990 To preserve an issue for appellate review, defendant must object at trial and include the issue in a post-trial motion. Under Illinois Rule of Evidence 103(a)(1), to properly object to the admission of evidence, a party must state the specific ground for the objection unless the specific ground is apparent from the record.

Here, the record showed that the specific grounds for defendant's objection (to the admission of a logbook showing that a Breathalyzer machine had been certified as accurate) was apparent from the context of the proceedings. When the State first attempted to enter the logbook into evidence, defense counsel objected on hearsay grounds. (A logbook is hearsay and thus would be admissible only where the State lays a proper foundation for its admission as an exception to the hearsay rule.) The court sustained the hearsay objection and the State attempted to lay a proper foundation.

Counsel again objected on the grounds that the logbook was not a business record. The court overruled this objection. Counsel continued to object to testimony about the logbook and the accuracy of the Breathalyzer, objections which the trial court characterized as a "continuing objection to the admissibility" of the logbook. In the post-trial motion, counsel preserved all objections made during trial, and during the hearing on the motion, counsel stated that the State did not lay a proper foundation.

Although counsel may not have specifically stated during trial or in the post-trial motion that she was objecting to the lack of a proper foundation, that ground was apparent from the context of the proceedings. And both the State and the trial court understood the nature of the objection. Defendant thus did not forfeit the issue.

Instrument logs certifying the accuracy of a Breathalyzer machine are hearsay, but may be admitted under the business-records exception to hearsay if the State lays a proper foundation. This foundation is laid by showing that the writing or record was made in the regular course of business at the time of the event or transaction, or a reasonable time thereafter. 720 ILCS 5/115-5(a). Illinois Rule of Evidence 803(6) similarly requires that a business entry be made at or near the time of the event or transaction.

Here the State presented evidence that the entry in the instrument logbook (showing that a Breathalyzer machine had been certified as accurate) was made in the regular course of business, but no evidence that it was made at the time of the event or within a reasonable time thereafter. The State thus failed to lay the necessary foundation. Without the logbook, there was no evidence about the accuracy of the Breathalyzer machine, which in turn meant the results of the Breathalyzer test could not be relied upon to find defendant guilty of driving under the influence of alcohol. The court reversed his conviction and remanded for a new trial.

People v. Hutchinson, 2013 IL App (1st) 102332 In Illinois criminal cases, medical records are generally inadmissible as business records. However, 625 ILCS 5/11-501.4 creates a business record exception to the hearsay rule which authorizes the admission of some blood alcohol test results in DUI prosecutions. Under §11-501.4, results from blood tests conducted on persons who are receiving medical treatment in a hospital emergency room are admissible in DUI prosecutions as a business record exception where: (1) the tests were ordered in the regular course of providing emergency medical treatment and not at the request of law enforcement authorities, and (2) the analysis was performed by the laboratory routinely used by the hospital. Under §501.4(a)(3), the results of such testing are admissible "regardless of the time that the records were prepared."

Thus, §11-501.4 creates a special exception to the general rule where the defendant is tried for DUI and the testing was performed as part of emergency medical treatment.

The court rejected the argument that at a trial for DUI, the State failed to satisfy the foundation requirements of §11-501.4 before introducing defendant's blood alcohol test results. Admission of test results under §11-501.4 requires a foundation that the defendant was receiving medical treatment in a hospital emergency room, the testing was ordered in the regular course of providing emergency medical treatment and not at the request of law enforcement authorities, and the analysis was performed by the laboratory routinely used by the hospital.

A trauma center nurse testified that it was standard procedure to draw blood from motor vehicle accident victims, that the testing was ordered as part of providing emergency treatment, and that she drew the blood sample, checked defendant's ID band, and labeled the sample. In accordance with hospital procedure, a second nurse confirmed that the blood was being drawn from the correct patient and initialed the sample. The nurse testified that the blood was sent to the hospital lab immediately, that the lab was wholly contained within the hospital, and that the lab was routinely used to process blood tests. The nurse also identified a hospital report which stated defendant's "Alcohol, Serum" level.

The court concluded that under these circumstances, the foundation requirements for the admissibility of the blood tests under §11-501.4 were satisfied.

The court rejected defendant's argument that the nurse's testimony could not satisfy the foundation requirements because she lacked knowledge of the hospital's blood testing and record keeping procedures. Under §11-501.4, there is no requirement that the foundational witness be familiar with the actual making of the business record. Furthermore, even under the general business record exception to the hearsay rule, the maker or custodian of the record need not testify to satisfy the foundation requirements for the exception. Instead, anyone who is familiar with the business and its procedures may testify to the foundation for the business record exception.

The court also rejected defendant's argument that §11-501.4 did not survive the enactment of Illinois Rule of Evidence 803(6), which provides that medical records are not admissible in criminal cases under the business record exception. The Illinois Rules of Evidence were intended only to codify existing evidentiary law, and not to modify that law.

(Defendant was represented by Assistant Defender Emily Hartman, Chicago.)

People v. Sundling, 2012 IL App (2d) 070455-B Defendant was charged with aggravated criminal sexual abuse against two children. The court concluded that the trial judge erred by admitting three prior convictions for sex offenses against children.

The court held that it was error to admit a 1984 Cook County conviction for indecent liberties and a 1997 Michigan conviction for attempted criminal sexual conduct with a person under the age of 13, because the only evidence consisted of certified copies and a docketing statement for the Cook County case and a copy of the charge and sentencing order in the Michigan case. Because the supporting evidence was insufficient to permit the trial court to determine that there were similarities between the prior offenses and the instant charges, the evidence should have been excluded.

Similarly, the trial court erred by admitting a 1997 Indiana conviction for child molestation. Although the State introduced a probable cause affidavit from the Indiana case, the affidavit should have been excluded for two reasons. First, the affidavit lacked sufficient indicia of reliability concerning the conduct underlying the conviction because it related to the original charges, not to a subsequent guilty plea which defendant entered after an Appellate Court in Indiana overturned the original conviction.

Second, the affidavit was inadmissible hearsay because it was an out-of-court statement offered to prove the truth of the matters asserted. The court found that the affidavit could not qualify for the business record exception to the hearsay rule; the business record exception does not apply to documents which are prepared in anticipation of litigation, and a probable cause affidavit is clearly created for purposes of litigation.

However, the court concluded that the erroneous admission of the other crimes evidence was not plain error. The defendant did not claim that the error was so serious that it affected the fairness of the trial and challenged the integrity of the process, and the court concluded that the evidence was not closely balanced.

Defendant's convictions for aggravated criminal sexual abuse were affirmed.

People v. Antonio, 404 Ill.App.3d 391, 935 N.E.2d 540 (1st Dist. 2010) Relying on 725 ILCS 5/115-5.1, the Appellate Court concluded that reports of postmortem examinations are business records that may be admitted without the requirement of an opportunity to cross-examine the declarant. Section 115-5.1 provides in pertinent part that "the records of the coroner's medical or laboratory examiner summarizing and detailing the performance of his or her official duties in performing medical examinations upon deceased persons or autopsies, or both, and kept in the ordinary course of business of the coroner's office, duly certified by the county coroner or chief supervisory coroner's pathologist or medical examiner, shall be

received as competent evidence in any court in this State, to the extent permitted by this Section."

Because postmortem examinations are business records, a medical examiner properly testified to the results of examinations conducted by another medical examiner and a forensic anthropologist. The medical examiner who performed the autopsy of a decomposed, headless body found no trauma other than dismemberment, and could not determine the cause or manner of death. The anthropologist examined the skeletal remains, found no antemortem injuries, and also could not determine a cause of death.

Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S.Ct. 2527, ___ L.Ed.2d ___ (2009), did not change this result. The United States Supreme Court concluded that reports of experts who tested controlled substances were comparable to affidavits offered to prove a fact at issue, and therefore among the core class of testimonial statements for which cross-examination was required. In contrast, the reports of the medical examiner and the anthropologist reached no conclusion as to the cause and manner of death, and did not prove the identity of the victim. There was little or nothing to confront in either report.

People v. Johnson, 376 Ill.App.3d 175, 875 N.E.2d 1256 (1st Dist. 2007) 1. To establish the admissibility of computer generated records as business records, the proponent must show that the evidence was created in the regular course of a business, that standard equipment was used, that the particular computer on which the records were created generates accurate records when used appropriately, that the computer was used appropriately when the records were created, and that trustworthiness is shown by the sources of information, method of recording, and time of preparation. The court noted with approval a Nebraska case indicating that an officer's background and training in computer crimes are relevant "when the crime charged required the use of a computer and the evidence necessitated an understanding of computer files, data recovery, and on-line chat rooms as well as instant messaging." (See **State v. Atchison**, 15 Neb.App. 422, 730 N.W.2d 115 (2007).)

2. The State failed to establish a sufficient foundation to submit computer-generated transcripts of conversations between the defendant and an undercover officer who was posing as a 14-year-old girl. The State "did nothing" to establish a foundation for the computer-generated records; it did not address the accuracy of the transcripts, the accuracy of the software used to compile them, or the undercover officer's competence to operate the software. In addition, an unexplained malfunction resulted in the loss of at least one conversation, and "[t]here was no evidence as to the cause or correction of the malfunction."

3. The failure to require an adequate foundation for the computer-generated transcripts constituted plain error where the trial judge appeared to rely on the transcripts despite his statement that they would be stricken. "Given the ambiguity of the court's ruling about what evidence was suppressed and the uncertainty about what evidence the trial court relied on to convict, we can only conclude that defendant was unfairly prejudiced."

People v. Downin, 357 Ill.App.3d 193, 828 N.E.2d 341 (3d Dist. 2005) The decision to admit a document is reviewed under an abuse of discretion standard. A finding that there is an adequate foundation to admit a document is merely a finding of sufficient evidence to justify presenting the evidence to the trier of fact; the opponent of the evidence is not precluded from contesting the genuineness of the document or the weight which it should be given.

In order to establish a sufficient foundation for the admission of e-mails, the prosecution was required to show a rational basis upon which the factfinder could conclude that the messages had been sent by the defendant. The factors used to authenticate writings in general also apply to e-mail messages.

Among the methods of establishing authorship of a document is showing that the writing reflects knowledge of an obscure matter known to only a small group of individuals. The court found that there was a rational basis to believe that e-mails were genuine where: (1) the defendant and complainant communicated by e-mail, (2) the complainant sent an e-mail at a police officer's request to the same e-mail address she had used in the past to contact the defendant, (3) the complainant testified that she received a response from the defendant's e-mail address to her e-mail address, and (4)that e-mail was responsive to the message the complainant had sent. Thus, the trial court did not abuse its discretion by admitting the messages.

People v. Davis, 322 Ill.App.3d 762, 751 N.E.2d 65 (1st Dist. 2001) Documents prepared in anticipation of litigation are not admissible as business records; however, retrieval of previously-made records in anticipation of litigation does not disqualify documents as business records.

The State did not establish a sufficient foundation to admit a printout showing the catalog numbers and prices of jewelry allegedly stolen by the defendant. The witness called to authenticate the document testified only that she retrieved the printout, and said nothing about the process by which the records were created, the nature of the occurrence that was recorded, or when the record was made. In addition, the witness claimed that she retrieved such records in the regular course of business, not that the merchant made the records in the regular course of its business.

People v. Lombardi, 305 Ill.App.3d 33, 711 N.E.2d 426 (2d Dist. 1999) Before a computer-generated record may be admitted under the business record exception to the hearsay rule, the proponent of the evidence must show that: (1) the electronic computing equipment is recognized as standard; (2) the input is entered in the regular course of business reasonably close to the time of the occurrence of the events recorded; and (3) the sources of information and method and time of preparation establish that the record is trustworthy. A trial court's decision to admit evidence under the business record exception will not be disturbed absent an abuse of discretion.

The State laid a sufficient foundation to justify admission of computer-generated banking records. Witnesses from the bank testified that in the normal course of business the information reflected by the exhibits was immediately entered into the computer system by tellers or automatic teller machines and was instantaneously stored in the mainframe computer, updating previous records stored there. Verification and accuracy of the system were shown by testimony that the computer systems were audited by three separate entities and that accounts were reconciled and balanced daily. There was also testimony that the copies of checks and other records were created in the ordinary course of business by bank employees using bank equipment.

Although the State did not specifically elicit testimony that the computer systems used by the bank were standard in the banking industry, there was testimony that the mainframe software was used by other banking institutions and that the software on the teller network was used by more than 500 institutions. Under these circumstances, there was a sufficient foundation to show that the records were trustworthy. Compare, **People v. Bovio**, 118 Ill.App.3d 836, 455 N.E.2d 829 (2d Dist. 1983) (computer-generated bank records were improperly admitted into evidence where testimony showed only that such records were kept by the bank in the regular course of business, without demonstrating that the equipment was standard or that the method of preparation indicated trustworthiness); **People v. Friedland**, 202 Ill.App.3d 1094, 560 N.E.2d 1012 (1st Dist. 1990)(evidence properly excluded

where there was no evidence of the type of computer system used by the bank and whether the system was recognized as standard, and no testimony to establish that the sources of information, method and time of preparation indicated the records were trustworthy).

People v. Virgin, 302 Ill.App.3d 438, 707 N.E.2d 97 (1st Dist. 1998) The trial judge improperly admitted, as a business record, a receipt from the Animal Control Department which showed that only a single, mixed breed dog was removed from the premises where defendant was arrested. The receipt was admitted to rebut defendant's claim that he was arrested because he objected to officers' plan to steal his three expensive dogs.

The rationale for the business record exception "is the recognition that businesses are motivated to keep routinely accurate records and that they are unlikely to falsify records kept in the ordinary course of business and upon which they depend." To establish the exception, a witness familiar with the business and its operations must testify that: (1) the record was made in the regular course of business, and (2) it was the regular practice of the business to make such a record. Here, there was no such testimony from anyone affiliated with the Animal Control Unit or familiar with its operations.

People v. Gayton, 293 Ill.App.3d 442, 688 N.E.2d 1206 (3d Dist. 1997) Under 725 ILCS 5/115-5(c)(2), records compiled during "any" investigation relating to "any" pending or anticipated litigation may not be admitted under the business record exception. In a prosecution for theft by deception, the trial court erred by admitting defendant's driver's abstract and testimony concerning his criminal history sheet. Although the records were not prepared in connection with the instant prosecution, the compilation of information submitted in relation to prior arrests and convictions is "made within the context of investigating pending or anticipated criminal prosecutions."

People v. Berberena & Santiago, 265 Ill.App.3d 1033, 639 N.E.2d 599 (1st Dist. 1994) Defendants contended that the trial court erred by admitting, under the "business records" exception, a "gang roster" listing the names of persons who had allegedly attended a gang meeting just before the crime. The Appellate Court held that the gang roster did not meet the requirements of the "business record" exception.

To admit a document as a business record, the proponent must show that: (1) the writing was made as a memorandum or record of an act or event, (2) the writing was made in the regular course of business, and (3) it was the regular course of the business to make such a record at the time of the transaction or within a reasonable time thereafter. Here, the State failed to show that it was in the regular course of the gang's business to make such records - the evidence showed that the record was prepared at the meeting, but not that it had been made in a "regular, prompt and systematic" manner. Furthermore, there was no evidence that anyone used or relied on the record, which was merely a sheet of paper found in a spiral notebook.

People v. Shiflet, 125 Ill.App.3d 177, 465 N.E.2d 942 (2d Dist. 1984) Apartment building records were properly admitted as business records where there was testimony that a separate maintenance file was kept on each apartment, the witness was familiar with and routinely used the records, and transactions were noted in the records as they occurred.

People v. Clark, 108 Ill.App.3d 1071, 440 N.E.2d 387 (1st Dist. 1982) Written lease agreements were properly excluded because the foundation witness had no personal knowledge of the business and its records.

In re Smith, 109 Ill.App.3d 786, 441 N.E.2d 92 (5th Dist. 1982) Attendance records kept by the Department of Mental Health are admissible as "records maintained by public officials." Records kept by persons in public office, which they are required to maintain in connection with the performance of their official duties, are admissible. See also, **People v. Williams**, 143 Ill.App.3d 658, 493 N.E.2d 362 (1st Dist. 1986) (a document consisting of certificates of vehicle title stapled to computer print-out sheets did not qualify as a public record where there was no evidence that the document was made in the ordinary course of business and authorized by statute or agency regulation or required by the nature of the public office).

People v. Collins, 69 Ill.App.3d 413, 387 N.E.2d 995 (1st Dist. 1979) A writing made as a memorandum of any event shall be admissible of such event if it was made in regular course of any business and if it was the regular course of business to make such memorandum at the time of such event or within a reasonable time thereafter.

Easley v. Apollo, 69 Ill.App.3d 920, 387 N.E.2d 1241 (1st Dist. 1979) Once records are admitted as business records, the absence of an entry therein could properly be admitted if accompanied by testimony that an entry would normally have been made.

People v. Morris, 65 Ill.App.3d 155, 382 N.E.2d 383 (1st Dist. 1978) Police reports are not admissible as business records, but may be used for impeachment or refreshing a witness's recollection.

People v. McClinton, 59 Ill.App.3d 168, 375 N.E.2d 1342 (1st Dist. 1978) It was improper for a police officer to testify that a certain weapon was checked through the firearms registration section and found to be registered to the defendant. "Generally, under the public records exception it is the record itself which is admissible and not the oral testimony of a witness concerning the contents of the record." However, oral testimony is admissible when the witness examined the record and it is physically impossible to produce the record in court.

People v. Hawthorne, 60 Ill.App.3d 776, 377 N.E.2d 335 (2d Dist. 1978) Record kept by county jail may be admissible to prove that defendant told the jailer what his address was, but not to prove the truth of defendant's statement.

People v. Lewis, 52 Ill.App.3d 477, 367 N.E.2d 710 (3d Dist. 1977) A motel ledger was properly introduced as a business record.

§19-28(c)
Summaries

Illinois Supreme Court
People v. Albanese, 102 Ill.2d 54, 464 N.E.2d 206 (1984) An accountant called as an expert witness by the State was properly allowed to testify that, based on review of voluminous documents, defendant was in "critical financial condition." It was "unreasonable to expect the jury to examine hundreds of pages of complex financial documents and make accurate computations concerning fund transfers, cash flow and liquidity, to determine the financial condition of [defendant]."

People v. Crawford Dist. Co., 78 Ill.2d 70, 397 N.E.2d 1362 (1979) "(W)here originals consist of numerous documents, books, papers or records which cannot be conveniently examined in court, and the fact to be proved is the general result of an examination of the whole collection, evidence may be given as to such result by a competent person who has examined the documents, provided the result is capable of being ascertained by calculation."

Admission of charts summarizing invoices was proper where it was inconvenient for the jurors to examine each of the more than 1200 invoices, the charts merely simplified and clarified what the invoices showed, and the State demonstrated that the investigator was an accountant who was capable of examining and summarizing the voluminous records.

Illinois Appellate Court

People v. Nwadiei, 207 Ill.App.3d 869, 566 N.E.2d 470 (1st Dist. 1990) At the defendant's trial for making fraudulent Medicare billings, an accountant testified about the total number of claims and the amount of money involved. An exhibit, prepared by the accountant, was entitled "Amount of Medicaid Dollars Paid for Fraudulent Claims." This exhibit contained several amounts labeled as "false," and the accountant referred to the exhibit as representing false or fraudulent claims.

The Appellate Court held that the use of the above exhibit was improper because it invaded the province of the jury by presenting the ultimate issue (i.e., whether defendant's billings were false) as an evidentiary fact.

§19-28(d)
Refreshing Recollection

Illinois Supreme Court

People v. Dixon, 28 Ill.2d 122, 190 N.E.2d 793 (1963) When a witness has some independent recollection of an incident but that recollection becomes exhausted, she may refer to notes to refresh her recollection.

People v. Krauser, 315 Ill. 485, 146 N.E. 593 (1925) A witness can testify only to facts within his knowledge and recollection, but is permitted to refresh and assist his memory by the use of a written instrument, memorandum or entry. It is not necessary that the writing was made by the witness himself or that it is an original writing, so long as after inspecting it the witness can speak to the facts from his own recollection. See also, **People v. Griswold**, 405 Ill. 533, 92 N.E.2d 91 (1950).

Illinois Appellate Court

People v. Morris, 65 Ill.App.3d 155, 382 N.E.2d 383 (1st Dist. 1978) Police reports may be used to refresh the recollection of a witness.

People v. Vance, 53 Ill.App.3d 573, 368 N.E.2d 758 (1st Dist. 1977) A nurse was improperly allowed to testify concerning the condition and treatment of defendant; the record showed that she did not testify from her own independent recollection, but only from the statements set out in her report.

People v. VanDyke, 40 Ill.App.3d 275, 352 N.E.2d 327 (1st Dist. 1976) A witness who is unable to recall relevant facts may use a written memorandum to refresh and assist his memory. The memorandum itself need not be evidence or have been prepared by the witness,

so long as he can speak to the facts from his own recollection after he has examined the memorandum. The fact that the witness refers to the memorandum more than once does not necessarily indicate a lack of sufficient present recollection.

People v. DeMario, 112 Ill.App.2d 175, 251 N.E.2d 267 (1st Dist. 1969) A witness may refer to a memorandum to refresh recollection, regardless whether the memorandum is admissible or was prepared by the witness. Opposing counsel has the right to inspect a memorandum used to refresh recollection.

§19-28(e)
Past Recollection Recorded

Illinois Supreme Court
People v. Strother, 53 Ill.2d 95, 290 N.E.2d 201 (1972) List of serial numbers of money used in narcotics purchase was properly admitted as past recollection recorded.

Illinois Appellate Court
People v. Andrews, 101 Ill.App.3d 808, 428 N.E.2d 1048 (1st Dist. 1981) The trial judge erred by refusing to admit a police report as past recollection recorded, for the limited purpose of impeachment. The crucial evidence in an armed robbery trial was the identification of the defendants, both of whom were dark skinned, by the victim and a customer. The police report in question listed the witness's brother as the customer, and showed that one of the robbers was described by the victim as "light-skinned." The officers who prepared the report could not recall who gave them the information contained in the report.

In finding that the report should have been admitted, the court noted that the requirements for past recollection recorded were satisfied. The officers who prepared the report had firsthand knowledge of what the witnesses told them, the report was made shortly after the interviews and while they had a clear memory of what was said, the officers testified the report was accurate when written, and they lacked recollection at the time of trial. See also, **Wilsey v. Schlawin**, 35 Ill.App.3d 892, 342 N.E.2d 417 (1st Dist. 1975) (where foundation is satisfied, police reports may be introduced as past recollection recorded).

People v. Carter, 72 Ill.App.3d 871, 391 N.E.2d 427 (1st Dist. 1979) A written document is admissible as past recollection recorded when a foundation consisting of the following elements is shown: (1) the witness has no present independent recollection of the incident, (2) the document does not refresh the witness's recollection, (3) the witness prepared the written document at the time of (or soon after) the incident, at a time when he or she had a clear and accurate memory of the incident, and (4) the witness vouches for the truth and accuracy of the document. It was improper to admit a report as past recollection recorded where the witness testified that he did not recall writing it.

People v. Olson, 59 Ill.App.3d 643, 375 N.E.2d 533 (4th Dist. 1978) State criminologists were properly allowed to testify directly from their notes — this procedure was not merely refreshing their recollection, but introducing evidence of their recorded past recollection without actually introducing the past writing itself. The doctrine of past recollection recorded does not require introduction of the writing if the adverse party fails to move for its admission.

People v. Munoz, 31 Ill.App.3d 689, 335 N.E.2d 35 (2d Dist. 1975) It was improper to allow introduction of a writing as past recollection recorded where witness failed to establish her firsthand knowledge of the event, failed to show that entry was made contemporaneously with event, and was unable to vouch for the accuracy of the entry.

People v. Jenkins, 10 Ill.App.3d 166, 294 N.E.2d 24 (1st Dist. 1973) Writing was not admissible as past recollection recorded where the witness testified only that he recognized his signature on the writing.

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